Supreme Court, U.S.
FILED

No. 09-___ 091380

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IN THE

Supreme Court of the United States

THE NATIONAL FOOTBALL LEAGUE,
Petitioner,

v.

KEVIN WILLIAMS AND PAT WILLIAMS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), "[i]f the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law * * * is pre-empted and federal labor-law principles * * * must be employed to resolve the dispute." *Lingle v. Norge Div. of Magic Chef. Inc.*, 486 U.S. 399, 405-406 (1988).

The question presented is:

Whether, when federal subject matter jurisdiction is not in question, and thus principles of ordinary, rather than complete, preemption are applicable, defenses that require analysis of a collective-bargaining agreement may substantively preempt state-law claims under Section 301, as the Seventh and Tenth Circuits have held, or whether such defenses are categorically irrelevant to preemption analysis, as the Eighth Circuit here and the Ninth Circuit have held.

PARTIES TO THE PROCEEDING

Petitioner, the National Football League, was a defendant in the district court and appellant/cross-appellee in the court below. Dr. John Lombardo and Adolpho Birch were also defendants-appellants/cross-appellees below, but have since been dismissed from the litigation and thus are not petitioners or parties in this Court.

The respondents, Kevin Williams and Pat Williams, were plaintiffs in the district court and appellees/cross-appellants in the court below.

The National Football League Players Association filed a separate lawsuit against the NFL and the National Football League Management Council that was consolidated with this case in the district court and in the court of appeals for purposes of briefing, oral argument and decision. The Association has not sought this Court's review of the court of appeals' decision and neither the Association nor the Management Council is a party before this Court.

RULE 29.6 STATEMENT

The National Football League ("NFL") is an unincorporated association of thirty-two member clubs organized under the laws of New York. The member clubs of the NFL are: Arizona Cardinals Football Club LLC; Atlanta Falcons Football Club, LLC; Baltimore Ravens Limited Partnership; Buffalo Bills, Inc.; Panthers Football, LLC; The Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland Browns Football Company LLC; Dallas Cowboys Football Club, Ltd; PDB Sports, Ltd. (d/b/a The Denver Broncos Football Club, Ltd.); The Detroit Lions, Inc.; Green Bay Packers, Inc.; Houston NFL Holdings, L.P.; Indianapolis Colts, Inc.; Jacksonville Jaguars, Ltd.; Kansas City Chiefs Football Club, Inc.; Miami Dolphins, Ltd.; Minnesota Vikings Football, LLC; New England Patriots L.P.; New Orleans Louisiana Saints, L.L.C.; New York Football Giants, Inc., New York Jets LLC; The Oakland Raiders, L.P.; Philadelphia Eagles, LLC; Pittsburgh Steelers LLC; The St. Louis Rams Partnership; Chargers Football Company, LLC; San Francisco Forty Niners, Limited; Football Northwest LLC; Buccaneers Limited Partnership; Tennessee Football, Inc.; Pro-Football, Inc.

Three of the clubs have parent corporations: KSA Industries, Inc. (Tennessee Football, Inc.); Football Northwest Management, Inc. (Football Northwest LLC); and Washington Football, Inc. and WFI Group, Inc. (Pro-Football, Inc.). No publicly-held company owns ten percent or more of the stock of any of those corporations.

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PETITION FOR A WRIT OF CERTIORARI

The National Football League respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 582 F.3d 863. The order of the court of appeals denying rehearing and rehearing en banc, and the accompanying opinions (Pet. App. 66a-76a), are reported at 598 F.3d 932. The decision of the district court (Pet. App. 42a-65a) is reported at 654 F. Supp. 2d 960. The decision of the arbitrator (Pet. App. 77a-91a) is unreported.

JURISDICTION

The court of appeals entered its judgment on September 11, 2009. Pet. App. 2a. The court denied the petition for rehearing and rehearing en banc on December 14, 2009. Pet. App. 75a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause of Article VI of the Constitution provides that "[t]he Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land." U.S. Const. Art VI.

Section 301 of the federal Labor Management Relations Act ("LMRA") provides that "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce * * * may be brought in any district court of the United States having jurisdiction of the parties." 29 U.S.C. § 185(a).

Additional relevant statutory provisions are reproduced at Pet. App. 92a-114a.

STATEMENT OF THE CASE

1. Respondents, members of the NFL Players Association ("Union"), the certified collective bargaining representative of all NFL players, are employed by the Minnesota Vikings, one of 32 teams in the National Football League. Pet. App. 3a. In 2006, the Union and the NFL entered into a nationwide Collective Bargaining Agreement ("CBA") that governs the terms and conditions of the employment of NFL players and establishes procedures for the resolution of employment disputes. *Ibid.*

The CBA incorporates the collectively bargained Policy on Anabolic Steroids and Related Substances ("Policy"). Pet. App. 3a-4a, 115a. The Policy bans players from using a variety of "Prohibited Substances," including steroids and "masking agents," such as diuretics, that can obstruct the detection of steroids. *Id.* at 118a. The Union and the NFL agreed in the Policy that any player who tests positive for a Prohibited Substance is subject to a minimum four-game suspension. *Id.* at 128a. Players may appeal their suspension to an arbitrator.

Under the Policy, the arbitrator's decision constitutes "a full, final, and complete disposition of the appeal" that is "binding on all parties." *Id.* at 132a.

2. In 2008, after taking a dietary supplement known as StarCaps, respondents tested positive for bumetanide, a diuretic that is a Prohibited Substance under the Policy. Pet. App. 7a. As required by the Policy, respondents were ordered suspended for four games. *Id.* at 7a-8a.

Respondents appealed their suspensions pursuant to the arbitration provisions of the Policy. In their appeal, respondents conceded that the test results were accurate. Respondents nevertheless claimed that their suspensions should be vacated on the ground that the NFL had not adequately warned them that StarCaps had been found to contain a banned substance. Pet. App. 86a.

After a full evidentiary hearing, the arbitrator upheld the suspensions. The arbitrator found that the "players used StarCaps at their own risk, did so in the face of repeated warnings about the risks inherent in using supplements in general and weight loss products in particular, and did so knowing that a positive test result would result in suspension and would not be excused based on a claim of unintentional or inadvertent use." Pet. App. 88a.

3. The day after the arbitrator issued his ruling, respondents filed suit in Minnesota state court against the NFL, the Independent Administrator of the Policy, the Policy's consulting toxicologist, and an NFL executive. Respondents asserted state common law claims and sought to enjoin enforcement of the arbitration award upholding their suspensions. Pet.

App. 12a. At the same time, on behalf of respondents and three suspended New Orleans Saints players who had also tested positive for bumetanide, the Union filed a lawsuit in federal court under Section 301 of the LMRA seeking to overturn the arbitration award. *Ibid.*

The NFL removed respondents' suit to federal court. Respondents did not seek to have the case remanded or otherwise oppose federal removal jurisdiction. Nearly a month later, while the case was pending in federal court, respondents amended their complaint in federal court to add claims under (i) the Minnesota Drug and Alcohol Testing in the Workplace Act ("DATWA"), Minn. Stat. § 181.950 *et seq.*, which establishes procedures for workplace drug and alcohol testing, but exempts testing conducted pursuant to a collective-bargaining agreement that "meets or exceeds" the statute's requirements; and (ii) the Minnesota Lawful Consumable Products Act ("LCPA"), Minn. Stat. § 181.938, which regulates the discipline of employees for consuming "lawful consumable products" "off the premises of the employer during nonworking hours," *id.* § 181.938(2), as long as use of the product is not contrary to a "bona fide occupational requirement," *id.* § 181.938(3)(a)(1). Pet. App. 12a.

The district court granted the NFL's motion for summary judgment on the Union's lawsuit, holding that the arbitration award validly suspended the players. Pet. App. 61a. The district court also held that respondents' state common law claims were preempted under Section 301. *Id.* at 51a. The district court held, however, that Section 301 did not

preempt respondents' statutory DATWA and LCPA claims and remanded those claims to state court. *Id.* at 52a, 64a.

4. A panel of the court of appeals affirmed. Pet. App. 1a-41a. It upheld the grant of summary judgment for the NFL on the Union's lawsuit. *Id.* at 3a. It also held that respondents' state common law claims were preempted under Section 301. *Ibid.*

With respect to respondents' state statutory claims, however, the court of appeals held those claims were not preempted by Section 301. Pet. App. 24a, 29a. In reaching that conclusion, the court of appeals looked only to respondents' complaint and ignored the NFL's defenses based on the collective bargaining agreement, holding as a matter of law that defenses simply are "not relevant to [the] [S]ection 301 preemption analysis." *Id.* at 26a.

5. By a 7-4 vote, the court of appeals denied rehearing en banc. Pet. App. 66a-76a. Chief Judge Loken and Judges Colloton, Riley, and Gruender dissented, objecting that the panel's decision had wrongly conflated substantive preemption principles with the jurisdictional doctrine of complete preemption and its corollary, the well-pleaded complaint rule. The dissenting judges explained that no question of federal jurisdiction arose because "[t]he NFL in this case invoked an ordinary preemption defense, based on § 301, against state-law claims that the plaintiffs filed in federal court." *Id.* at 73a. In that context, the dissenting judges reasoned, "[o]rdinary preemption * * * provides a substantive defense to a state law action on the basis

of federal law, in whatever forum the case * * * is litigated." *Ibid.*

The dissenting judges further explained that the panel's failure to maintain the distinction between substantive preemption and the jurisdictional doctrine of complete preemption resulted in its failure to uphold federal labor law, and put the Eighth Circuit in conflict with the law of the Seventh Circuit and with this Court's precedent. Pet. App. 75a ("The procedural distinction between cases involving complete preemption and ordinary preemption, ably explained with reference to by the Seventh Circuit in *Smith v. Colgate-Palmolive Co.*, 943 F.2d 764, 769-71 (7th Cir. 1991), suggests that the * * * panel incorrectly declared the NFL's defenses to the state-law claims irrelevant to the question of ordinary preemption under § 301."). [1]

REASONS FOR GRANTING THE WRIT

This Court's review is needed because the court of appeals' decision expands and deepens a circuit conflict on a question of vital importance to federal

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[1] On remand, the state court enjoined for nearly ten months enforcement of the arbitration award, and conducted a week-long trial with thirteen witnesses where the court heard evidence on the meaning and interpretation of the CBA. On May 6, 2010, the state court ruled that the NFL's compliance with the Policy's terms violated DATWA, but, finding that respondents suffered no harm, entered judgment for the NFL. *Williams v. National Football League*, No. 27-CV-08-29778 (Minn. 4th Dist. Ct. May 6, 2010). The court vacated its injunction, but is currently considering whether to reinstate the injunction pending appeal.

labor law. The Eighth Circuit's holding that defenses based on a collective bargaining agreement are irrelevant to the preemption of state law claims originally brought in federal court squarely conflicts with the law of the Seventh and Tenth Circuits. That conflict arises from deep-seated confusion in the Circuits about the different functions performed by the doctrines of ordinary preemption and complete preemption. The former is a rule of substantive law that gives effect to the Supremacy Clause and, in the labor law context, to Congress's determination that uniformity in the interpretation of collective bargaining agreements is imperative. The complete preemption doctrine, by contrast, addresses federal subject matter jurisdiction in removed cases. They thus are distinct doctrines performing markedly different functions. As the Seventh and Tenth Circuits have held, defenses based on a collective bargaining agreement are irrelevant to the complete preemption (*i.e.*, removability) of state laws claims originally filed in federal court, but are relevant to the ordinary, substantive preemption of state law claims originally brought in federal court.

Over the dissent of its then- and current- chief judges and two other members, the Eighth Circuit has rejected the approach of the Seventh and Tenth Circuits and joined itself to the Ninth Circuit by collapsing the two doctrines, holding that defenses are categorically "not relevant to [the] [S]ection 301 preemption analysis." Pet. App. 26a. Like the Ninth Circuit, the Eighth Circuit equates the jurisdictional non-removability of a case with a rejection on the merits of any preemption defense. That approach is wrong and significantly unsettles labor law. Absent

review by this Court, the Eighth Circuit has opened the door widely to conflicting interpretations and enforcement of a single collective bargaining agreement – as the ensuing state-court injunction against enforcement of the collectively bargained Policy here well illustrates. Yet that is the very problem that Congress enacted the LMRA to prevent. For nationwide collective bargaining agreements, the impact is particularly profound because the conflicting circuit law renders uniform interpretation and operation of the collective bargaining agreement impossible.

I. THE EIGHTH CIRCUIT'S DECISION CEMENTS AN ENTRENCHED AND RECURRING CONFLICT IN THE COURTS OF APPEALS

Under Section 301 of the LMRA, a state-law claim that is "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract," *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985), "must be brought under § 301 and be resolved by reference to federal law," *id.* at 210. That is because uniformity in the administration of collective bargaining agreements is the centerpiece of federal labor law:

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.

Teamsters v. Lucas Flour Co., 369 U.S. 95, 103-104 (1962).

The Eighth Circuit's decision creates the very disruption against which *Lucas Flour* warned because it widens a circuit split on whether defenses based on a collective bargaining agreement are relevant to Section 301 preemption of state law claims brought in federal court in the first instance. *See Schacht v. Caterpillar, Inc.*, 503 U.S. 926 (1992) (White, Blackmun, J.J., dissenting from denial of certiorari) (discussing the conflict).

A. In conflict with the Eighth Circuit's decision here, both the Seventh and Tenth Circuits have held that, for ordinary questions of substantive preemption, defenses that require analysis of a collective-bargaining agreement must be considered. As the Seventh Circuit has explained, when "plaintiffs * * * ch[o]ose to file their state-law claim in federal court" – as respondents did here with their state statutory claims – ordinary preemption analysis "has a different focus than the Supreme Court's attention to the 'well-pleaded complaint rule' in [*Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987)]." *Smith*, 943 F.2d at 770. In such cases, the Seventh Circuit ruled, a court is "free to resolve th[e] [preemption] question by looking beyond the plaintiffs' complaint to the defenses [that are] assert[ed]." *Ibid.*[2]

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[2] Indeed, when, as here, plaintiffs chose to bring state-law claims in a federal court action, the jurisdictional rationale behind the well-pleaded complaint rule that the plaintiffs are

The Tenth Circuit has likewise held that, "[i]f a CBA must be interpreted to resolve [a state-law] claim, even if the CBA interpretation is initiated by the defense, the * * * claim [is] preempted by § 301." *Fry v. Airline Pilots Ass'n*, 88 F.3d 831, 838 n.8 (10th Cir. 1996). Like the Seventh Circuit, the Tenth Circuit's decision recognized that precedent from this Court interpreting the complete preemption rule of removal jurisdiction gives plaintiffs "leeway in choosing their forums, not in avoiding preemption." *Ibid.* That holding cannot be reconciled with the Eighth Circuit's decision here.

The wooden rule of irrelevance adopted by the court of appeals in this case, however, does match the law in the Ninth Circuit. In *Sprewell v. Golden State Warriors*, 266 F.3d 979 (9th Cir. 2001), a case where federal jurisdiction was not in dispute, the Ninth Circuit held that a defense based on a collective bargaining agreement was irrelevant to Section 301 preemption because only "[t]he plaintiff's claim is the touchstone [of the preemption] analysis." *Id.* at 991 (internal quotations omitted). In support of its decision, the Ninth Circuit relied upon a complete preemption removal case, underscoring its doctrinal conflation of the removal jurisdiction and substantive preemption questions. *See id.* at 694-695 (citing *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683 (9th Cir. 2001)).

Because the Eighth Circuit denied rehearing en banc (by a divided vote), only this Court can bring

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the masters of their complaint for purposes of selecting the forum to resolve their claims – is not even implicated.

uniformity and consistency to this important question of labor law. Indeed, the Eighth Circuit's decision now cements the conflict by removing the Ninth Circuit's status as a lone voice on the irrelevance of defenses. And by thus expanding the conflict, the Eighth Circuit has eliminated the prospect that the courts of appeals will harmonize their law through the rehearing en banc process.

In addition to the ordinary considerations that make the elimination of circuit conflicts appropriate exercises of the Court's certiorari jurisdiction, uniformity in the construction of collective bargaining agreements is a structural imperative of federal labor law. Thus, in this case, both traditional certiorari considerations and the unique need to avoid a checkerboard of federal labor law rules underscore the need for this Court's intervention now.

B. The Court's review is further warranted because the Eighth Circuit's decision (as well as the law in the Ninth Circuit) is in irreconcilable tension with the law of the Third Circuit under the Railway Labor Act, *Capraro v. United Parcel Serv. Co.*, 993 F.2d 328 (3d Cir. 1993). This Court has held that the Railway Labor Act's preemption standard is "virtually identical" to the Section 301 standard, and has adopted the Section 301 framework to resolve claims of Railway Labor Act preemption. *Hawaiian Airlines v. Norris*, 512 U.S. 246, 259 (1994).

Unlike the Eighth Circuit here, the Third Circuit has held that defenses based on a collective-bargaining agreement must be considered as part of the preemption analysis under the Railway Labor

Act. *Capraro*, 993 F.2d at 332; *see also Geddes v. American Airlines, Inc.*, 321 F.3d 1349, 1352-1353 (11th Cir. 2003) ("clarify[ing]" in Railway Labor Act case, "the differences between 'complete' preemption and 'ordinary' preemption," and explaining that, while "a case may *not* be removed to federal court on the basis of a federal defense, including that of federal preemption," "[o]rdinary preemption may be invoked in both state and federal courts as an affirmative defense to the allegations in plaintiff's complaint [and] [s]uch a defense asserts that the state claims have been substantively displaced by federal law").

The position of the Eighth and Ninth Circuits also cannot be reconciled with decisions of other circuits that have recognized the distinction between ordinary preemption and complete preemption under the Employee Retirement Income Security Act, the preemptive force of which "mirror[s] the pre-emptive force of LMRA § 301," *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004). *See Felix v. Lucent Techs., Inc.*, 387 F.3d 1146, 1158 (10th Cir. 2004) ("The difference between preemption and complete preemption is important."); *id.* at 1156 ("Although courts and parties often confuse [ERISA] § 514 preemption with § 502(a) complete preemption, the Supreme Court has held that the two are distinct concepts."); *Ervast v. Flexible Prods. Co.*, 346 F.3d 1007, 1014 (11th Cir. 2003) ("What is often confused is that [complete preemption and defensive preemption] are two different questions."); *Sonoco Prods. Co. v. Physicians Health Plan, Inc.*, 338 F.3d 366, 371 (4th Cir. 2003) ("In the ERISA context, the doctrines of conflict preemption and complete

preemption are important, and they are often confused.").

In sum, absent review by this Court, preemption law under the Railway Labor Act and ERISA will conflict with – not "mirror" – preemption law under Section 301 of the Labor Management Relations Act, contrary to this Court's precedent.

II. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT

This Court's review is also warranted because, as the dissenting judges explained, Pet. App. 72a-75a, the Eighth Circuit's decision (joining the Ninth Circuit) cannot be reconciled with this Court's precedent both addressing preemption under the LMRA and demarcating the limited jurisdictional function of the complete preemption rule.

Section 301 of the LMRA preempts state-law claims if their "resolution" "depends upon the meaning of a collective-bargaining agreement." *Lingle*, 486 U.S. at 406. Such claims must be preempted because "federal labor law principles – necessarily uniform through the Nation – must be employed to resolve the dispute." *Ibid.*

"Resolution" of a claim necessarily involves more than analysis of the claimant's pleading, which is the exclusive focus of the complete preemption rule's jurisdictional inquiry. Resolution entails the broader question of the proper substantive disposition of a claim. If resolution of the claim requires construction of the collective bargaining agreement, then, as in *Lingle*, federal labor law, not state law, must govern.

There is no other way to maintain the uniformity in construction of collective bargaining agreements that the LMRA mandates.

That is why, when this Court found no jurisdiction in a removal case based on the presence of a collective bargaining agreement defense in *Caterpillar, supra*, the Court nevertheless held that the question of substantive preemption based on that same defense was to be addressed on remand. 482 U.S. at 398 at n.13. As the four dissenting judges below explained, "if the employer's defense were irrelevant to ordinary preemption, * * * then there would have been no reason for the Court in *Caterpillar* to reserve judgment on the merits of the preemption defense." Pet. App 74a.

Lingle confirms the point in a ruling that is indistinguishable from the case at hand and should have controlled the Eighth Circuit's decision here. In *Lingle* (as here), defendants removed state court claims to federal court on the basis of diversity of citizenship. 486 U.S. at 402. The *Lingle* plaintiffs (like respondents here) did not challenge the removal, so removal jurisdiction (and thus the complete preemption doctrine) was not at issue. *See ibid.* This Court then proceeded to conduct an ordinary preemption analysis to determine whether the plaintiffs' claims were barred. In so doing, the Court expressly included in its analysis whether the employer's defenses would require interpretation of the collective bargaining agreement. *Id.* at 407. If, as the Eighth Circuit held, "the employer's defenses were irrelevant to ordinary preemption analysis, then

there would have been no reason for th[is] Court to consider them" in *Lingle*. Pet. App. 74a.

Lingle, moreover, made clear that its analysis applied fully to state statutory claims like those pressed by respondents here. This Court explained that "a State could create a remedy that, although nonnegotiable," as statutory claims often are, "nonetheless turned on the interpretation of a collective-bargaining agreement for its application." 486 U.S. at 407 n.7. Those claims "would be pre-empted by § 301," as would "a law [that] applied to all state workers but required, at least in certain instances, collective-bargaining agreement interpretation." *Ibid.*

As *Lingle* and this case illustrate, the resolution of state-law claims in employment disputes is often substantially dependent on the interpretation of a collective bargaining agreement. Neither that dependence nor the need for uniformity is lessened because interpretation is required by a defense rather than an affirmative claim. Similarly, the uniformity prescribed by federal labor law cannot exist if there is one rule of substantive preemption in this Court and in the Seventh and Tenth Circuits, and a totally different rule in the Eighth and Ninth Circuits.

III. THE QUESTION PRESENTED IS OF SUBSTANTIAL AND RECURRING IMPORTANCE

The general principle underlying Section 301 preemption is that the interpretation of collective bargaining agreements be "necessarily uniform

throughout the Nation," *Lingle*, 486 U.S. at 406. The court of appeals' decision and the circuit conflict on Section 301's universal application deprives the law of that uniformity, and only this Court's review can restore it.

The Eighth Circuit's decision destroys the orderly and predictable negotiation and administration of collective bargaining agreements that Section 301 is specifically designed to ensure. *Lueck*, 471 U.S. at 211. The court's ruling allows a plaintiff's unilateral control over the pleading of its complaint to avoid preemption even when a collective bargaining agreement would need to be interpreted to resolve the dispute between the parties. That, in turn, allows state courts across the country to interpret collective bargaining agreements inconsistently and to give their terms different meanings, or even to ignore them entirely.

The Court need look no further than the proceedings after remand in this case. The state court promptly enjoined enforcement of the arbitrator's award interpreting and enforcing the collectively bargained Policy, even though that award had been upheld by both the district court and the Eighth Circuit. *See Williams v. NFL*, No. 27-CV-08-29778, slip op. (Minn. 4th Dist. Ct. July 9, 2009). That, in turn, created one collectively bargained rule for NFL players in Minnesota and a different rule under the same collective bargaining agreement for all other NFL players. The court then held a week-long trial with more than a dozen witnesses on whether the NFL is an "employer" for purposes of DATWA, during which it heard evidence on the

meaning and application of the collective bargaining agreement. *See Williams v. NFL*, No. 27-CV-08-29778, at 20 (Minn. 4th Dist. Ct. Feb. 18, 2010) ("The NFL, *through the terms agreed upon in the CBA*, does exercise control over and direct some aspect of Plaintiffs' work as professional football players [and thus] could, perhaps, be a joint employer of Plaintiffs.") (emphasis added); *see also Williams v. NFL*, No. 27-CV-08-29778, at 3-4, 6, 15, 17-19, 21-22 (Minn. 4th Dist. Ct. May 6, 2010) (holding that NFL's administration of the collective bargaining agreement is subject to DATWA based, *inter alia*, on findings about the meaning and operation of the collective bargaining agreement, including a determination that the NFL is the respondents' "employer").[3]

Until the Eighth Circuit ruled, it was axiomatic that any effort to use state law to overturn or enjoin a provision of a collectively bargained agreement would be preempted. The Eighth Circuit's holding to the contrary "strikes at the very core of federal labor policy." *Lucas Flour*, 369 U.S. at 104. Indeed, it

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[3] The trial court granted summary judgment for the NFL on the LCPA claim, concluding that the NFL's prohibition of bumetanide was a "bona fide occupational requirement for professional football players" because, *inter alia*, "the collective bargaining agreement outlines standard minimum pre-season physical examination criteria, regulates pre-season training sessions, and establishes off-season workout rules." *Williams v. NFL*, *supra*, at 37-39. While that decision is undoubtedly correct, that the state court was even considering the issue contravenes the command of this Court in *Lingle* that "interpretation of collective-bargaining agreements remains firmly in the arbitral realm." 486 U.S. at 411.

empowers state courts in each State in which NFL teams operate to issue different decisions on the rights and obligations of the NFL and NFL players under their supposedly national collective bargaining agreement.

The impact of the Eighth Circuit's decision on federal labor law does not stop there.

First, the law in the Eighth and Ninth Circuits now leaves employers whipsawed between obeying state law and violating the terms of a collective bargaining agreement. In this case, federal labor law commands that the NFL enforce the collectively bargained Policy consistent with its text and the arbitrator's award interpreting and applying that text. The respondents' state-law claims insist that the NFL was legally bound not to adhere to the Policy. The state court, in fact, enjoined such compliance. The Eighth Circuit's erroneous preemption decision thus has turned federal labor law from a uniform and stable framework for labor-management relations into a legal Catch-22 in which employers are literally liable if they do comply with the collective bargaining agreement, and liable if they do not.

Second, the Eighth Circuit's decision opens wide the state courthouse door to efforts by the losing parties in labor arbitrations to use state law to rewrite the arbitrator's interpretation of the collective bargaining agreement. That flouts the central role of arbitration in the administration of collective bargaining agreements. *See, e.g.*, *Lueck*, 471 U.S. at 219 ("The need to preserve the effectiveness of arbitration was one of the central

reasons that underlay the Court's holding in *Lucas Flour*."); *Lingle*, 486 U.S. at 411 ("A [preemption] rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, . . . as well as eviscerate a central tenet of federal labor contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance.") (citation omitted).

Third, under the Eighth Circuit's ruling, parties to a collective bargaining agreement must now consider the "possibility that individual contract terms might have different meanings under state and federal law," which will "inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Lucas Flour*, 369 U.S. at 103-104. Thus, employers must "try[] to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract." *Ibid.*

Here, the NFL and the Union now face the daunting task of "trying to formulate contract provisions in such a way as to contain the same meaning under" the laws of the more than two-dozen states that are home to NFL teams. Subjecting uniform and collectively bargained national drug-testing policies to state-by-state modification and alteration defeats the central purpose of such policies, makes collective bargaining over their terms unworkable, and "frustrate[s] the federal labor-contract scheme established in § 301," *Lueck*, 471 U.S. at 209.

Finally, for national sports leagues, enforcing uniform standards of player conduct is indispensable to ensuring a level competitive playing field. *See* Major League Baseball, *et al.* C.A. Amicus Br.; *see also National Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, 640 (9th Cir. 1993) ("Consistency among members must exist if an organization [like the NCAA] is to thrive, or even exist. Procedural changes at the border of every state would as surely disrupt the NCAA as changes in train length at each state's border would disrupt a railroad."). The piecemeal rewriting, state by state, of a national collective bargaining agreement eviscerates the uniformity and evenhandedness in player qualifications that are essential to national sports leagues.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Policy on Anabolic Steroids and Related Substances (2008) 115a

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 09-2247/2462

Kevin Williams; Pat Williams,	*	
	*	
Plaintiffs - Appellees/	*	
Cross Appellants,	*	
	*	
v.	*	Appeals from
	*	the United
National Football League;	*	States District
John Lombardo, M.D.,	*	Court for the
	*	District of
Defendants - Appellants/	*	Minnesota.
Cross Appellees,	*	
	*	
Brian Finkle,	*	
	*	
Defendant,	*	
	*	
Adolpho Birch,	*	
	*	
Defendant - Appellant/	*	
Cross Appellee.	*	
	*	
	*	

National Basketball Association;	*
National Hockey League;	*

United States Anti-Doping Agency; *
Major League Baseball, *
*
Amici on behalf of *
Appellant. *

No. 09-2249

National Football League Players *
Association, *
*
Plaintiff - Appellant, *
*
v. *
*
National Football League; National *
Football League Management *
Counsel, *
*
Defendants - Appellees. *
*

Submitted: August 18, 2009
Filed: September 11, 2009

Before MURPHY, BENTON, and SHEPHERD, Circuit Judges.

SHEPHERD, Circuit Judge.

In these consolidated appeals, the National Football League (NFL), Dr. John Lombardo, Independent

Administrator of the Policy on Anabolic Steroids and Related Substances, and Adolpho Birch, the NFL's Vice President of Law and Labor Policy, appeal the district court's[1] order, concluding that the Minnesota statutory claims alleged by Kevin Williams and Pat Williams of the Minnesota Vikings (collectively, "the Players") are not preempted by section 301 of the Labor Management Relations Act ("section 301" or "LMRA"), 29 U.S.C. § 185. The Players cross-appeal the district court's order concluding that their Minnesota common law claims are preempted by section 301. In addition, the National Football League Players Association (the "Union"), the certified collective bargaining representative of all NFL players, appeals the district court's order confirming the arbitration awards which upheld the Players' suspensions. We affirm in all respects.

I.

The NFL is an unincorporated association of member clubs which own and operate professional football teams. The NFL promotes, organizes, and regulates professional football in the United States. Players in the NFL enter into a contract with a member club, not the NFL. NFL Players Association, NFL Collective Bargaining Agreement 2006-2012, App. C at 248 (2006) [hereinafter CBA]. On March 8, 2006, the National Football League Management Council (NFLMC), which is the sole and exclusive bargaining agent of the member clubs, and the Union entered into the NFL Collecting Bargaining Agreement 2006-2012 (the "CBA"). The CBA expressly incorporates the Pol-

[1] The Honorable Paul A. Magnuson, United States District Judge for the District of Minnesota.

icy on Anabolic Steroids and Related Substances (the "Policy").[2] *Id.* art. XLIV, § 6(b). The CBA provides that "all players, Clubs, the [Union], the NFL and the [NFLMC] will be bound hereby." *Id.* art. II, § 1.

The Policy "is conducted under the auspices of the [NFLMC]." NFL Players Association, National Football League Policy on Anabolic Steroids and Related Substances, § 2 (2008) [hereinafter Policy]. It is "directed" by Dr. Lombardo as "Independent Administrator." *Id.* The Policy also provides for a "Consulting Toxicologist," Dr. Bryan Finkle. *Id.* The Policy bans NFL players from using a number of "Prohibited Substance[s]," including "'blocking' or 'masking' agents[,]" such as "diuretics or water pills, which have been used in the past by some players to reach an assigned weight." *Id.* § 8. The Policy addresses the consequences of a player's "[u]nknowing [a]dministration of [p]rohibited [s]ubstances." *Id.* § 3(E). It adopts a rule of strict liability under which "[p]layers are responsible for what is in their bodies," and explains that "a positive test result will not be excused because a player was unaware he was taking a Prohibited Substance." *Id.* Section eight of the Policy, entitled "Masking Agents and Supplements," states that "a positive test result will not be excused because it results from the use of a dietary supplement, rather than from intentional use of a Prohibited Substance." *Id.* § 8.

"Players with a confirmed positive test result will be subject to discipline by the Commissioner as outlined in the Policy . . . ." *Id.* § 6. "The *first* time a player violates this Policy by testing positive [for a

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[2] The Policy was amended in 2007 and 2008. Hereinafter, "the Policy" refers to the 2008 version. References to 2006 version of the Policy are so noted.

banned substance] . . . he will be suspended without pay for a minimum of four regular and/or postseason games." *Id.* Players subject to disciplinary action may appeal to an arbitrator, who is "either the Commissioner or his designee," and whose decision "constitute[s] a full, final, and complete disposition of the appeal" that is "binding on all parties." *Id.* § 10.

Appendix F to the Policy, a joint letter from the Union and the NFL entitled "Use of Supplements," warns that, because dietary "supplements are not regulated . . . by the government," there is "no way to be sure" that supplements "contain the ingredients listed on the packaging[.]" *Id.* App. F. The letter "strongly encourage[s] [players] to avoid the use of supplements altogether," and warns that, "if you take these products, you do so AT YOUR OWN RISK!" *Id.* The letter advises that "several players have been suspended even though their positive test result may have been due to the use of a supplement" and that "**if you test positive or otherwise violate the Policy, you *will* be suspended**" because "[y]ou and you alone are responsible for what goes into your body." *Id.* Appendix G to the Policy, entitled "Supplements," is a memorandum from Dr. Lombardo which states, "If you take supplements that contain a substance that violates the [P]olicy it will subject you to discipline[,]" and, "[m]ore importantly, you run the risk of harmful health effects associated with their use." *Id.* App. G.

Players may contact the "NFL Dietary Supplement Hotline" to obtain "confidential and accurate information about these products, including their ingredients, effects[,] and adverse reactions." (No. 09-2249, Defs.-Appellees' Supp. App. 5.) The memorandum announcing the hotline provides: "Although we *strongly*

discourage the use of supplements for many reasons, we understand that an informed decision is the best one." (*Id.*) The memorandum goes on to caution players, stating, *"You and you alone are still responsible for what goes into your body.* Using the Hotline will not excuse a positive test result." (*Id.*)

In 2006, several NFL players tested positive for bumetanide,[3] a prescription diuretic and masking agent that is banned under the Policy. Policy App. A(II)(A). When Dr. Lombardo was alerted to a possible connection between the positive results for bumetanide and StarCaps, a dietary supplement, he informed Dr. Finkle. The StarCaps label does not disclose bumetanide as an ingredient. Dr. Finkle asked Dennis Crouch, Director of the Sports Medicine Research Testing Laboratory, to analyze StarCaps. On November 14, 2006, Crouch emailed Dr. Finkle and Dr. Lombardo, informing them that StarCaps contained bumetanide. Birch was also made aware of this.

On December 19, 2006, the NFLMC sent a memorandum to the presidents, general managers, and head athletic trainers of all NFL teams entitled "Dietary Supplement Endorsement Prohibition." (*Id.* at 6.) The memorandum provides: "Effective immediately, please be advised that **Balanced Health Products,** which distributes **StarCaps**, has been added to the

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[3] Bumetanide is a "loop diuretic used in treatment of edema associated with congestive heart failure or hepatic or renal disease, treatment of hypertension, usually in combination with other drugs, and as an adjunct in treatment of acute pulmonary edema" that is "administered orally, intramuscularly, or intravenously." *Dorland's Illustrated Medical Dictionary* 263 (31st ed. 2007).

list of companies with which player endorsements or other business relationships are prohibited." (*Id.*) The memorandum does not state StarCaps was banned under the Policy, that StarCaps contained bumetanide, or that StarCaps contained any banned substance. (*See id.*)

On December 20, 2006, Stacy Robinson, the Union's Director of Player Development, sent a memorandum to all NFL agents. (*Id.* at 7.) The memorandum states: "Please be advised that effective immediately **Balanced Health Products**, which distributes **StarCaps,** has been added to the list of prohibited dietary supplement companies. Players are prohibited from participating in any endorsement agreements with this company or using any of their products." (*Id.*)

Dr. Lombardo did not refer any player who tested positive for bumetanide in 2006 for discipline. Sometime in late 2006 or 2007, Birch communicated with Dr. Lombardo about Dr. Lombardo's duties under the Policy. Birch informed Dr. Lombardo that if a player tested positive for a banned substance then, assuming the player had no therapeutic reason to be taking the banned substance, the player must be referred to the NFL for discipline.

In July and August 2008, players in the NFL submitted to random testing for steroids and other substances in accordance with the Policy. In total, five players—Kevin Williams and Pat Williams of the Minnesota Vikings, and Charles Grant, Deuce McAllister, and Will Smith of the New Orleans Saints—tested positive for bumetanide. In late September and early October 2008, all of the players were advised by letter that their positive results were a vio-

lation of the Policy and that a suspension without pay of four games was being imposed for the violations. Pursuant to the Policy, all five players appealed their suspensions, and their appeals were consolidated.

Beginning on October 23, 2008, Jeffrey Pash, Vice President and General Counsel of the NFL, met with representatives of the Vikings three times "in the context of what [he] understood to be . . . threats of litigation" arising out of the suspensions and providing legal advice. (*Id.* at 234.) Although "at the very first" Pash did not know that Pat Williams and Kevin Williams were involved, he learned of this via letters from Peter R. Ginsberg, the Players' counsel. (*Id.*) On October 30, 2008, Ginsberg contacted Pash and Birch via letter. In the letter, Ginsberg acknowledges that "several veteran NFL players recently have tested positive for a banned diuretic during random League-sponsored drug testing." (*Id.* at 23.) Ginsberg states that "we believe [the current NFL testing procedure] is unfair and violative of the players' fundamental and guaranteed rights . . . ." (*Id.*) Ginsberg notes that three of his clients have "clinical weight problems," two of whom have had to add "weight clauses into their contracts." (*Id.* at 23-24.) He also identifies "this [a]s a further complicating factor since a person who has a weight condition falls within a protected class" under the Americans with Disabilities Act.[4] (*Id.* at 24 n. 1.) Ginsberg suggests that the NFL should employ a new drug test procedure, including the addition of an alternative test.[5] (*Id.* at 24-25.) Ginsberg concludes by

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[4] 42 U.S.C. § 12101 *et seq.*

[5] Ginsberg states:

stating, "We appreciate your consideration of this correspondence and hope that appropriate parties can arrange to meet with the Commissioner and you in advance of a hearing regarding the proposed punishment of the players involved." (*Id.* at 26.)

Pash had several discussions with Ginsberg, including a telephone conversation on November 3, 2008, and at least one meeting. (*Id.* at 235, 238.) On November 7, 2008, Ginsberg again contacted Pash via letter. (*Id.* at 28-30.) The letter: (1) answers Pash's request for information with regard to the Dilute Sample Reflex Test, (2) requests the NFL administrative record regarding Ginsberg's clients, (3) notes Ginsberg's "concern[] that the laboratory used by the NFL may not have all the documents we need in order to perform a complete evaluation of the tests" which will be necessary "if a hearing ultimately is necessary [and] that any further delay in receiving the administrative record will require us to seek to adjourn the hearing," and (4) includes an article which Ginsberg

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> The current test should be used in the first instance. If there is a positive test for a banned diuretic, the alternative test, we submit, should then be used. If it yields a positive test, of any amount, for steroids, then the player should be punished according to the current guidelines. On the other hand, if the test does not yield a reading of even a trace of a banned steroid, the player then should be given a fair warning letter that a second detection of a banned diuretic would result in punishment as currently set forth in the Policy.

(No. 09-2249, Defs.-Appellees' Supp. App. 25.) The alternative test "uses a larger sample of a player's specimen and, unlike the test currently used by the NFL, is significantly more reliable in determining whether banned steroids are in a person's system, and thus provides a far more accurate gauge of the reason why the detected diuretic has been used." (*Id.* at 24.)

characterizes as demonstrating "that the sports world seems to be in the process of reevaluating the breadth of banned substances considered to be 'masking agents.'" (*Id.* at 28.) Ginsberg concludes by requesting that "[i]f there is any medical indication that the substance allegedly involved with my clients, in the amounts detected, presents any objective medical concern, we hope that the NFL will provide such information in advance of the hearing." (*Id.* at 29.)

Between November 10 and 13, 2008, Roger Goodell, the Commissioner of the NFL ("the Commissioner"), designated Pash as the Hearing Officer for the five players' appeals of their suspensions. (*Id.* at 239.) Also, in that same time period, Pash learned that StarCaps contained bumetanide. (*Id.* at 237.) The arbitration hearing took place on November 20, 2008. Each player testified that he was taking StarCaps around the time of his positive bumetanide test and that he did not know that StarCaps contained bumetanide. The players admitted that they were aware of the warnings regarding supplements, the supplement hotline, and the Policy's rule that each player is responsible for what is in his body. However, the players argued that their positive results should be excused because Dr. Lombardo and the NFL knew, as of November 2006, that at least some StarCaps capsules contained bumetanide—an undisclosed banned substance—and did not specifically advise NFL players of this fact. After the hearing but before issuing his decisions, Pash communicated with the Commissioner regarding "the threat of litigation that [Pash] thought hung over these proceedings." (*Id.* at 239.)

In decisions dated December 2, 2008, Pash determined that the language of the Policy required that

the suspensions of all five players be upheld. As arbitrator, he observed:

> Notwithstanding the rule of strict liability, each player contends that his violation should be excused because the NFL and Dr. Lombardo were aware that StarCaps contained an undisclosed banned substance, bumetanide, but did not specifically advise NFL players of this fact. The players do not contend that the NFL, [the Union,] or Dr. Lombardo is obligated to test supplements for banned substances and inform players of the result of those tests. But where, as here, the testing process leads to specific information about a specific product, the players argue that the league and Dr. Lombardo have a duty to inform NFL players of the specific threat of the specific product . . . . [T]hey contend that where specific evidence is available about a particular product, a specific warning is required, and that the failure to extend such a warning should excuse any violation of the Policy associated with that product.

(*Id.* at 164.) Pash rejected the players' argument in light of: (1) the rule of strict liability embodied in the Policy, (2) the 20-year history of the application of the Policy, (3) the "repeated[] warn[ings] that if [players] take supplements, they do so at their own risk," (4) the "repeated warnings about the risks inherent in using supplements in general and weight loss products in particular," and (5) the fact that the players took StarCaps "knowing that a positive test would result in suspension and would not be excused based on a claim of unintentional or inadvertent use." (*Id.* at 165.) Pash

further noted that "[t]he Policy does not articulate or impose an obligation to issue specific warnings about specific products, and nothing in the record suggests that the bargaining parties have ever contemplated imposing such a requirement on Dr. Lombardo." (*Id.*)

On December 3, 2008, the Players filed suit against the NFL, Dr. Lombardo, Dr. Finkle, and Birch in Minnesota District Court for the Fourth District,[6] alleging numerous violations of Minnesota common law.[7] That same day, the state court issued a temporary restraining order ("TRO") blocking the suspensions. Following entry of the TRO, the NFL removed the case to federal district court.

On December 4, 2008, the Union, on behalf of all five players, initiated a separate suit in federal court against the NFL and NFLMC, alleging breach of contract under section 301. The Union sought to have the arbitration awards upholding the suspensions vacated as contrary to the essence of the CBA/Policy, as a violation of public policy, and as being rendered by a biased arbitrator. On January 2, 2009, the Players filed an amended complaint in federal court, adding two

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[6] We note that both of the Players' contracts with the Vikings, in effect at the time of their positive test results, state that Minnesota law governs the contracts.

[7] The Players' Complaint contains 11 counts: Count I seeks injunctive relief; Count II alleges a breach of fiduciary duty by the NFL; Count III contends that the NFL aided and abetted breaches of fiduciary duty; Count IV raises a violation of public policy; Counts V and VI are claims of fraud and constructive fraud; Counts VII, VIII, and IX raise negligent misrepresentation, negligence, and gross negligence claims; Count X alleges intentional infliction of emotional distress; and Count XI contends that the NFL is vicariously liable for the torts committed by the individual defendants.

counts. Count XII asserted a violation of Minnesota's Drug and Alcohol Testing in the Workplace Act (DATWA), Minn. Stat. §§ 181.950-957, and Count XIII asserted a violation of Minnesota's Consumable Products Act (CPA), Minn. Stat. § 181.938.

On December 5, 2008, the district court granted the Union's motion for a preliminary injunction and declined to overturn the TRO entered in state court prior to removal, which allowed the players to continue playing until the end of the NFL's 2008-09 season. Following expedited discovery, the parties filed cross-motions for summary judgment. The district court granted the NFL's motion for summary judgment in part and denied it in part. The court denied the Union and the Players' motion for summary judgment. First, the district court concluded that the Players' common law claims were preempted by section 301 such that they must be construed as section 301 claims. Second, the court determined that the arbitration awards did not fail to draw their essence from the CBA/Policy because the arbitrator's decision construed and applied the language of the Policy. Also the arbitrator acted within the scope of his discretion under the Policy. Third, the court concluded that the Union's argument—that the NFL and Dr. Lombardo violated public policy by failing to disclose that StarCaps contained bumetanide—failed because Dr. Lombardo warned players about weight-loss supplements in general and testified that had a player asked him about StarCaps he would have disclosed that it contained bumetanide. The court determined that Dr. Lombardo's decision not to provide an ingredient-specific warning was within his discretion. The court further decided that the NFL had no duty to specifi-

cally inform players when a supplement is found to contain a banned substance. Finally, the court determined that Pash was not a partial arbitrator and, even if Pash's involvement could somehow establish bias, the Players and the Union had waived any such claim. Therefore, the court dismissed the Union's section 301 breach of contract claim and the Players' common law claims (which the court had already determined were actually § 301 claims).

With respect to the Players' DATWA and CPA claims, the court found that the claims were not preempted because the rights and obligations under the statutes existed independently of the CBA/Policy. Having dismissed all of the federal claims, the district court declined to exercise supplemental jurisdiction over the DATWA and CPA claims, concluding that the statutes are a reflection of Minnesota public policy and, thus, it was more appropriate for a Minnesota state court to resolve the claims. The NFL, the Players, and the Union each appeal portions of the district court's summary judgment order.

II.

The NFL appeals the district court's partial denial of its motion for summary judgment. Specifically, the NFL appeals the district court's decision that the Players' Minnesota statutory claims are not preempted by section 301. Conversely, the Players appeal the district court's determination that their Minnesota common law claims are preempted by section 301. We review the preemption issues de novo. *Bogan v. Gen. Motors Corp.*, 500 F.3d 828, 832 (8th Cir. 2007).

A.

We first consider the DATWA claim. The NFL asserts that the DATWA claim is preempted because: (1) the claim turns on analysis of the Policy in order to determine whether it "meets or exceeds" DATWA's requirements, (2) the claim requires interpretation of the Policy in order to determine whether the NFL qualifies as an employer under DATWA such that the statute's protections extend to the Players, and (3) uniform interpretation of the CBA/Policy is necessary to preserve the integrity of the NFL's business as a national organization.

We begin our analysis by reviewing the section 301 preemption doctrine. Section 301 applies to "[s]uits for violation of contracts between an employer and a labor organization," 29 U.S.C. § 185(a), or, in other words, suits for breaches of CBAs. The Supreme Court has held that federal law exclusively governs suits for breach of a CBA, *see Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957), and that "the pre-emptive force of [section] 301 extends beyond state-law contract actions[,]" *United Steelworkers v. Rawson*, 495 U.S. 362, 369 (1990); *see Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210 (1985). Section 301 preempts state-law claims that are "substantially dependent upon analysis" of a CBA, *Lueck*, 471 U.S. at 220, because "the application of state law . . . might lead to inconsistent results since there could be as many state-law principles as there are States . . . [,]" *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 406 (1988). Rather, "federal labor-law principles—necessarily uniform throughout the nation—must be employed to resolve the dispute." *Id.* However, the Court has established that section 301 does not pre-

empt state law claims merely because the parties involved are subject to a CBA and the events underlying the claim occurred on the job. *See Lueck*, 471 U.S. at 211 ("Of course, not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 . . . ."); *see also Graham v. Contract Transp., Inc.*, 220 F.3d 910, 913 (8th Cir. 2000) (providing that "a claim is not preempted simply because it relates to a dispute in the workplace").

In applying the section 301 preemption doctrine, we begin with "the claim itself," *see Trustees of the Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc.*, 450 F.3d 324, 331 (8th Cir. 2006), and apply a two-step approach in order to determine if the claim is sufficiently "independent" to survive section 301 preemption, *see Bogan*, 500 F.3d at 832. First, a "state-law claim is preempted if it is 'based on' [a] . . . provision of the CBA[,]" meaning that "[t]he CBA provision at issue" actually sets forth the right upon which the claim is based. *Id.* Second, section 301 preemption applies where a state-law claim "is 'dependent upon an analysis' of the relevant CBA," meaning that the plaintiff's state-law claim requires interpretation of a provision of the CBA. *Id.*

DATWA governs drug and alcohol testing in the Minnesota workplace by imposing "minimum standards and requirements for employee protection" with regard to an employer's drug and alcohol testing policy. Minn. Stat. § 181.955 subdiv. 1. DATWA lists minimum informational requirements for the contents of drug policies.[8] *Id.* § 181.952 subdiv. 1. DATWA sets

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[8] Pursuant to DATWA, the drug policies of Minnesota employers must provide:

forth the criteria that a testing laboratory must meet in order for an employer to use its services. *Id.* § 181.953 subdiv. 1.

DATWA also requires that an employer provide an employee, who tests positive for drug use, with "written notice of the right to explain the positive test[,]" *Id.* § 181.953 subdiv. 6(b), an opportunity "to explain that result," *Id.* § 181.953 subdiv. 6(c), and the ability to "request a confirmatory retest of the original sample at the employee's or job applicant's own expense . . . [,]" *id.* DATWA precludes an employer from "discharg[ing] [or] disciplin[ing] . . . an employee on the basis of a positive result . . . that has not been verified by a confirmatory test." *Id.* § 181.953 subdiv. 10(a). Specifically, with respect to first-time offenders, an employer cannot discharge such an employee unless the employee is first given the opportunity to participate in treatment and refuses to participate or fails to successfully complete the program. *Id.* § 181.953 subdiv. 10(b)(1)-(2).

DATWA expressly addresses CBAs. Subdivision two of section 181.955 mandates that DATWA applies

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> (1) the employees or job applicants subject to testing under the policy; (2) the circumstances under which drug or alcohol testing may be requested or required; (3) the right of an employee or job applicant to refuse to undergo drug and alcohol testing and the consequences of refusal; (4) any disciplinary or other adverse personnel action that may be taken based on a confirmatory test verifying a positive test result on an initial screening test; (5) the right of an employee or job applicant to explain a positive test result on a confirmatory test or request and pay for a confirmatory retest; and (6) any other appeal procedures available.

Minn. Stat. § 181.952 subdiv. 1(1)-(6).

to all CBAs in effect after passage of the law in 1987. *See id.* § 181.955 subdiv. 2. However, subdivision one of section 181.955 provides that DATWA "shall not be construed to limit the parties to a collective bargaining agreement from bargaining and agreeing with respect to a drug and alcohol testing policy that meets or exceeds, and does not otherwise conflict with, the minimum standards and requirements for employee protection . . . ." *Id.* § 181.955 subdiv. 1.

We note that it is unclear which specific violations of DATWA that the Players are alleging, other than the failure to use certified laboratories.[9] The amended complaint does not flesh out the claim but generally states that the "[d]efendants have violated the Players' substantive and procedural rights under the Minnesota Drug and Alcohol Testing in the Workplace Act." (Am. Compl. ¶ 98.) The district court, in discussing the DATWA claim, noted that "[a]mong other things, DATWA provides that an employee may not be disciplined on the basis of an initial positive test and requires the employer to allow the employee the right to explain a positive test[,]" and that "[t]he NFL concedes that its steroid testing procedures do not comply with the letter of Minnesota law, but argues that the differences are negligible and do not require the Court to invalidate the Williamses' positive tests for bumetanide." (Dist. Ct. Summ. J. Order 20.)

First, the NFL contends that, because the Players were tested pursuant to a collectively bargained-for drug policy, DATWA liability hinges on whether the Policy affords protections that are equivalent to or

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[9] At oral argument, the Players' counsel indicated that their DATWA claim was premised, at least in part, on the NFL's conceded failure to use certified laboratories.

greater than DATWA's mandatory protections. The NFL asserts that DATWA creates two paths to compliance such that an employer may conduct its drug testing either: (1) in compliance with DATWA or (2) pursuant to a CBA providing employees with equivalent or greater protections than DATWA. The NFL argues that this will necessarily require a court to construe the terms of the Policy in order to determine whether its protections for players "meets or exceeds" DATWA's protections such that any DATWA claim alleged by the Players is preempted by section 301. *See* Minn. Stat. § 181.055 subdiv. 1. Thus, the NFL is essentially arguing that an employee has no DATWA claim if he or she is a party to a CBA that is at least as protective of the employee as DATWA. We disagree.

DATWA does not state that an employee who is a party to such a CBA cannot bring a claim under DATWA. Rather, where there is a CBA that is at least as protective of employees as DATWA, the number of possible claims an employee has against his or her employer will be affected. Where the employer complies with DATWA but not with its CBA that provides greater protection, the employee could have a only a claim for breach of contract. Where the employer does not comply either with DATWA or its CBA that provides equivalent or greater protection than DATWA, the employee could potentially have two claims, a claim for breach of contract and a DATWA claim.

Here, a court would have no need to consult the Policy in order to resolve the Players' DATWA claim. Rather, it would compare the facts and the procedure that the NFL actually followed with respect to its drug testing of the Players with DATWA's requirements for determining if the Players are entitled to prevail.

Such a claim is not preempted. *See Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 261, 266 (1994) ("'[P]urely factual questions' about an . . . employer's conduct . . . do not 'requir[e] a court to interpret any term of a [CBA].'" (quoting *Lingle*, 486 U.S. at 407)); *see also Thompson v. Hibbing Taconite Holding Co.*, No. 08-868, 2008 WL 4737442, *1, *4 (D. Minn. Oct. 24, 2008) (unpublished) (holding that a terminated employee's multiple DATWA claims alleged "violat[ions] [of] such non-negotiable state law rights [which] d[id] not require an interpretation of the CBA, and would not be preempted under the LMRA"). The Tenth Circuit considered an analogous fact situation in *Karnes v. Boeing Co.*, 335 F.3d 1189 (10th Cir. 2003). There, a former employee brought an action against Boeing under Oklahoma's Standards for Workplace Drug and Alcohol Testing Act. *Id.* at 1192. Although the plaintiff did not identify the specific sections of the Act that Boeing violated, the court observed that "within the sections he cite[d]" was a provision providing that "[n]o disciplinary action, except for a temporary suspension or a temporary transfer to another position, may be taken by an employer against an employee based on a positive test result unless the test result has been confirmed by a second test." *Id.* at 193 (quotation omitted). The court observed that "[i]n order to establish a violation of this section, [the plaintiff] must show that Boeing (1) discharged him based on his drug test, and (2) failed to confirm the result through a second test. Neither inquiry requires a court to interpret, or even refer to, the terms of a CBA." *Id.* Therefore, the court found that the state statutory claim was "clearly independent of the CBA and . . . not subject to § 301 preemption." *Id.* at 1194.

Second, the NFL contends that, because DATWA provides employees with a cause of action against their employers, interpretation of the CBA/Policy is required in order to determine if the NFL qualifies as an employer under DATWA.[10] Section 301 preempts a state law claim if its "resolution . . . *depends upon the meaning* of a collective-bargaining agreement." *Lingle*, 486 U.S. at 405-06 (emphasis added). "[T]he Supreme Court has distinguished those which require interpretation or construction of the CBA from those which only require reference to it." *Trustees*, 450 F.3d at 330; *see Livadas v. Bradshaw*, 512 U.S. 107, 124-25 (1994) (holding there was no section 301 preemption because a wage rate provision of the CBA only had to be referenced to compute the proper damages). "An otherwise independent claim will not be preempted if the CBA need only be consulted during its adjudication." *Trustees*, 450 F.3d at 330. In sum, section 301 does not preempt every employment dispute, and it does not preempt all other disputes concerning CBA provisions. *Miner v. Local 373*, 513 F.3d 854, 865 (8th Cir. 2008). "Rather, the crucial inquiry is whether 'resolution of a state-law claim depends upon the meaning of a [CBA].'" *Id.* (quoting *Lingle*, 486 U.S. at 405-06).

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[10] DATWA defines an employer as "a person or entity located or doing business in this state and having one or more employees . . . ." Minn. Stat. § 181.950 subdiv.7. An employee is "a person, independent contractor, or person working for an independent contractor who performs services for compensation, in whatever form, for an employer." *Id.* § 181.950 subdiv.6. The NFL maintains that the Minnesota Vikings, not the NFL and the individual defendants, are the Players' employer such that DATWA does not apply. Although the NFL conceded that it does business within Minnesota, it did not concede that it has one or more employees there.

The NFL does not point to a specific provision of either the CBA or the Policy which must be interpreted. The CBA's Preamble provides that NFL players are "employed by a member club of the National Football League[.]" CBA, Preamble. Appendix C to the CBA contains the "NFL Player Contract,"[11] which provides that the contract "is between . . . [the] 'Player,' and . . . 'Club,' . . . as a member of the National Football League." *Id.* App. C at 248. The contract further states: "Club employs Player as a skilled football player. Player accepts such employment." *Id.* None of these references require interpretation, only mere consultation, which is insufficient to warrant preemption of an otherwise independent state law claim. *See Livadas*, 512 U.S. at 124-25; *Trustees*, 450 F.3d at 330. Furthermore, the Players' contracts, likely dispositive in determining who their employer is, are actually separate documents from the CBA such that there is no need to reference the form contract contained in Appendix C of the CBA to examine them.[12]

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[11] The CBA states that the form contract contained in Appendix C "will be used for all player signings" and "cannot be amended without the approval of the [NFLMC] and the [Union]." CBA art. XIV, § 1.

[12] We note that the matter of who is the employer of an NFL player was addressed in *Brown v. Nat'l Football League*, 219 F. Supp. 2d 372 (S.D.N.Y. 2002). There, a former NFL player brought a personal injury action in state court against the NFL, seeking damages for a career-ending eye injury he sustained during a game when a referee threw a penalty flag that struck the player in the eye. *Id.* at 375. The district court observed, "At the time of his injury, Brown worked not for the NFL, but for the Cleveland Browns Football Company, a Delaware limited partnership and an entirely separate entity which happens to be a member of the NFL." *Id.* at 383. The owners of NFL teams "own franchises in the NFL and employ the [U]nion members as foot-

Finally, the NFL argues that denying preemption and subjecting the Policy to divergent state regulations would render the uniform enforcement of its drug testing policy, on which it relies as a national organization for the integrity of its business, nearly impossible. The Ninth Circuit, sitting en banc, has rejected a similar argument. *See Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 695 n.9 (9th Cir. 2001) (en banc). In *Cramer*, the employer, a large trucking company, "argue[d] that the terms of CBAs affecting employees in multiple states should supersede inconsistent state laws." *Id.* at 688, 695 n.9. The Ninth Circuit observed, "This contention overreaches, however, because the LMRA certainly did not give employers and unions the power to displace any state regulatory law they found inconvenient." *Id.* at 695 n.9. We think this is the proper result in light of the Supreme Court's observation that:

> [T]here [is not] any suggestion that Congress, in adopting § 301, wished to give the substan-

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ball players." *Id.*; *see also Clarett v. Nat'l Football League*, 369 F.3d 124, 138 (2d Cir. 2004) ("Because the NFL players have unionized and have selected the NFLPA as its exclusive bargaining representative, labor law prohibits Clarett from negotiating directly the terms and conditions of his employment with any NFL club[.]"); *White v. Nat'l Football League*, 41 F.3d 402, 406 (8th Cir. 1994), *abrogated on other grounds by Amchem Prods. v. Windsor*, 521 U.S. 591 (1997) ("The settlement agreement [at issue] purports to end a six-year dispute between the NFL member teams and their player-employees."); *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1269 (3d Cir. 1979) ("This appeal presents several interesting questions growing out of the employment by the Philadelphia Eagles Football Club ('the Eagles') of a former professional player, Don Chuy ('Chuy')."). We do not address the impact of this on the Players' ability to prevail on their DATWA claim against the NFL.

> tive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored. *Clearly, § 301 does not grant the parties to a [CBA] the ability to contract for what is illegal under state law.* In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.

Lueck, 471 U.S. at 211-12 (footnote omitted) (emphasis added); *see Livadas*, 512 U.S. at 123 (cautioning that section 301 "cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law"); *see also Karnes*, 335 F.3d at 1194 (noting that "the fact that the CBA incorporated Boeing's anti-drug policy is irrelevant because '§ 301 does not grant the parties to a [CBA] the ability to contract for what is illegal under state law'" (quoting *Lueck*, 471 U.S. at 212)). Therefore, the NFL's national uniformity argument fails.

In sum, the Players' DATWA claim is predicated on Minnesota law, not the CBA or the Policy, and the claim is not dependent upon an interpretation of the CBA or the Policy. Thus, the Players' DATWA claim is not preempted by section 301.

B.

We now turn to the CPA claim. The CPA generally prohibits employers from "disciplin[ing] or discharg[ing] an employee because the . . . employee en-

gages in or has engaged in the use or enjoyment of lawful consumable products, if the use or enjoyment takes place off the premises of the employer during nonworking hours." Minn. Stat. § 181.938 subdiv. 2. "'[L]awful consumable products' means products whose use or enjoyment is lawful and which are consumed during use or enjoyment, and includes food, alcoholic or nonalcoholic beverages, and tobacco." *Id.* However, employers can restrict employee consumption of "lawful consumable products" if they "relate[] to a bona fide occupational requirement and [are] reasonably related to employment activities or responsibilities of a particular employee or group of employees," *id.* § 181.938 subdiv. 3(a)(1), or are "necessary to avoid a conflict of interest or the appearance of a conflict of interest with any responsibilities owed by the employee to the employer[,]" *id.* § 181.938 subdiv. 3(a)(2).

The NFL asserts that the CPA claim is subject to section 301 preemption because: (1) whether the Policy's ban on bumetanide violates the CPA requires interpretation of the Policy in order to determine whether the ban is a bona fide occupational requirement or necessary to avoid a conflict of interest, (2) the CPA only applies to the use of substances "off the premises of the employer" and "during nonworking hours" such that a court would have to analyze the CBA and the Policy in order to determine whether the CPA applies here, and (3) the Players waived their rights under the CPA when the Union, their bargaining agent, became a party to the Policy.

First, the NFL contends that the Players' CPA claim is preempted by section 301 because, without interpreting the CBA and the Policy, a court cannot

determine whether the ban on bumetanide is a bona fide occupational requirement, or necessary to avoid a conflict of interest such that the ban does not violate the CPA. However, the NFL's defenses to liability under the CPA are not relevant to our section 301 analysis.[13] *See Bogan*, 500 F.3d at 833; *see also Meyer v.*

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[13] This court has previously addressed the conflict in our precedent with regard to the section 301 preemption with some of our cases failing to apply section 301 preemption "in an appropriately narrow way." *See Meyer v. Schnucks Markets, Inc.*, 163 F.3d 1048, 1050 (8th Cir. 1998). The *Meyer* Court stated:

> When faced with conflicting precedents of this kind, we are free to choose which line of cases to follow. We think that the narrower approach to LMRA preemption, which asks only whether the claim itself is necessarily grounded in rights established by a CBA, is more faithful to the Supreme Court's [precedent] . . . .

Id. at 1051 (citation omitted). Specifically, with respect to defenses to liability as a basis for section 301 preemption, our precedent is conflicted. *See Bogan*, 500 F.3d at 833. For example, in *Johnson v. Anheuser Busch, Inc.*, 876 F.2d 620 (8th Cir. 1989), this court stated that an employer's "defenses, as well as [the employee's] claims, must be considered in determining whether resolution of the state law claim requires construing the [CBA]." *Id.* at 623 (quotation omitted). However, the *Bogan* Court noted, "[W]e have on other occasions rejected this broader approach to LMRA preemption, that is, an approach where the employer's defenses are relevant." 500 F.3d at 833. The *Bogan* Court applied the narrower approach in which an employer's defenses to liability are irrelevant to the question of section 301 preemption as "more faithful to [Supreme Court precedent]" and reversed the district court's determination that the plaintiff's intentional infliction of emotional distress claim was preempted." *Id.* (quotation omitted); *see Dunn v. Astaris, LLC*, 292 F. App'x 525, 527 (unpublished per curiam) (8th Cir. 2007). *Dunn* explained,

> Some of our cases have applied [Supreme Court precedent with regard to section 301 preemption] in a rather broad way. Nevertheless, we find the line of cases that has taken a narrower approach to LMRA preemption—

Schnucks Markets, Inc., 163 F.3d 1048, 1051 (8th Cir. 1998). Therefore, neither of the NFL's potential defenses to the Players' CPA claim, i.e. the bona-fide-requirement exception, *see* Minn. Stat § 181.938 subdiv. 3(a)(1), or the conflict-of-interest exception, *see id.* § 181.938 subdiv. 3(a)(2), can serve as a basis for subjecting the CPA claim to section 301 preemption.

Second, the NFL asserts that the CPA claim is subject to preemption because the CPA applies to the use of substances "off the premises of the employer" and "during nonworking hours," Minn. Stat. § 181.938 subdiv. 2, such that a court could not resolve whether the CPA applies here without interpreting the CBA and the Policy. We note that once again the NFL has failed to direct us to a specific provision of the CBA or the Policy that must be construed. The NFL asserts that the relevant time period is training camp since that is when the Players tested positive for bumetanide and suggests that, during that time, NFL players are never "off the premises of the employer" and

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> asking only whether the claim itself, *regardless of probable defenses*, is necessarily grounded in rights established by the CBA—is the better approach.

Id. (citation omitted) (emphasis added).

We agree with *Bogan* and *Meyer* that the narrower approach to section 301 is more faithful to Supreme Court precedent and consider only the Players' CPA claim itself, and not the NFL's defenses to liability, in determining whether the claim is preempted. *See Bogan*, 500 F.3d at 833; *Meyer*, 163 F.3d at 1051; *see also Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99 (1987) (holding that a defendant cannot subject a state law claim to federal preemption by raising a defense that requires analysis of a CBA); *Cramer*, 255 F.3d at 691 (holding that "[i]f the claim is plainly based on state law, § 301 preemption is not mandated simply because the defendant refers to the CBA in mounting a defense") (citing *Caterpillar*, 482 U.S. at 398-99)).

have no "nonworking hours." (Nos. 09-2247/2492, Defs.-Appellants' Br. 30.)

Without any direction from the NFL, we have reviewed the 361-page document, provision-by-provision, for references to "training camp." Article XXXVII of the CBA is entitled "PRE-SEASON TRAINING CAMPS" and has eight sections: Definition, Room and Board, Rookie Per Diem, Veteran Per Diem, Reporting, Number of Pre-Season Games, Telephones, and Expenses. CBA, art. XXXVII. However, we see nothing in this section relevant to the terms "off the premises of the employer" or "nonworking hours." We have also looked to the CBA's other mentions of training camp but again found nothing relevant to the question of what constitutes "off the premises of the employer" and "during nonworking hours" while an NFL player is attending training camp. Furthermore, we find no mention of training camp in the Policy. We are unaware of exactly what document would resolve this issue; perhaps a team's schedule for training camp? But this is not our riddle to solve, as it is the NFL's burden to establish preemption of the Players' CPA claim. *See Barnes ex rel. Estate of Barnes v. Koppers, Inc.*, 534 F.3d 357, 362 (5th Cir. 2008) ("[T]he party asserting federal preemption of state law . . . bears the burden of persuasion."). Thus, we reject the NFL's argument that preemption is necessary because resolving the meaning of the terms "off the premises of the employer" or "nonworking hours" while an NFL player is at training camp requires interpretation of the CBA and the Policy.

The NFL's final argument for preemption is that the Players have waived their rights under the CPA because their bargaining representative, the Union,

agreed to the drug testing procedures and discipline provided for by the Policy. However, neither of the cases that the NFL relies on, *Lueck* and *A.J. Lights, LLC v. Synergy Design Group, Inc.*, 690 N.W.2d 567 (Minn. Ct. App. 2005), supports such a proposition. First, the NFL quotes *Lueck* in part to state that "in the absence of any affirmative legislative direction, the presumption is that the [CPA's] rights 'can be waived or altered by agreement of private parties[.]'" (Nos. 09-2247/2492, Defs.-Appellants' Br. 31 (quoting *Lueck*, 471 U.S. at 213)) However, the entire quote from *Lueck* states something completely different: "[S]tate-law rights and obligations *that do not exist independently* of private agreements, and that as a result can be waived or altered by agreement of private parties, are preempted by those agreements." *Lueck*, 471 U.S. at 213 (emphasis added). Because the CPA undisputedly creates rights independent of the CBA or the Policy, they cannot be waived or altered by the Union's agreement to the CBA and the Policy. Second, *A.J. Lights* examined whether "the [Minnesota Termination of Sales Representatives Act] supercede[s] a contractual arbitration agreement by allowing a sales representative to file a claim in a court of law prior to arbitration." 690 N.W.2d at 568. Therefore, *A.J. Lights* is wholly inapplicable here and the NFL has not demonstrated that, by agreeing to be bound by the CBA, the Players waived their rights under the CPA. Because each of the NFL's arguments for subjecting the Players' CPA claim to section 301 preemption fails, we hold that the CPA claim is not preempted.

C.

Finally, we consider the Players' common law claims: breach of fiduciary duty, aiding and abetting a

breach of fiduciary duty, violations of public policy, fraud, constructive fraud, negligent misrepresentation, negligence, gross negligence, intentional infliction of emotional distress, and vicarious liability. The Players argue that the claims are not preempted because they involve purely factual questions about the NFL's conduct and do not require interpretation of any provision of the CBA or the Policy. Again, we consider issues of preemption de novo. *Bogan*, 500 F.3d at 832.

As with the Players' state statutory claims, "a state-law tort action against an employer may be preempted by [section] 301 . . . ." *Rawson*, 495 U.S. at 369 (citing *Lueck*, 471 U.S. at 211). We apply the same test here to determine whether such claims are preempted, examining whether the tort claims: (1) are premised on duties created by the relevant CBA such that they are "based on" the agreement, or (2) require interpretation of the CBA such that they are "dependent upon an analysis" of the agreement. *See Bogan*, 500 F.3d at 832.

According to the Players, their breach of fiduciary duty, negligence, and gross negligence claims are each "premised on the fact that the NFL had a common duty to the Williamses once it sought and found out the dangerous fact that StarCaps contained Bumetanide." (Nos. 09-2247/2462, Pls.-Appellees-Cross-Appellants' Br. 58) Thus, each tort claim is seeking recovery for the NFL's and the individual defendants' failure to disclose to the Players that StarCaps contained bumetanide, despite the defendants' undisputed awareness of that fact. The Players assert that this duty to provide an ingredient-specific warning for StarCaps does not arise from the Policy but from a

duty that Minnesota law imposes on the NFL as a fiduciary, an employer, and as one who voluntarily undertook to act or speak. However, whether the NFL or the individual defendants owed the Players a duty to provide such a warning cannot be determined without examining the parties' legal relationship and expectations as established by the CBA and the Policy. Thus, the breach of fiduciary duty, negligence, and gross negligence claims are "inextricably intertwined with consideration of the terms of the [Policy]." *See Bogan*, 500 F.3d at 833 (quoting *Lueck*, 471 U.S. at 220). Because the claims "relating to what the parties to a labor agreement agreed . . . must be resolved by reference to uniform federal law," *Lueck*, 471 U.S. at 211, they are preempted by section 301.

The Players' misrepresentation claims (fraud, constructive fraud, and negligent misrepresentation)[14] are also preempted because the Players cannot demonstrate the requisite reasonable reliance to prevail on their claims without resorting to the CBA and the Policy. In *Trustees*, a Minnesota corporation brought a third-party complaint against a union, of which a number of the corporation's employees were members, claiming fraudulent and negligent misrepresentation, and fraudulent concealment. 450 F.3d at 326, 328. This court concluded that the plaintiff had not ade-

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[14] Each of these claims require the Players to show they reasonably relied on the lack of an ingredient-specific warning with regard to StarCaps to establish that StarCaps did not contain a banned substance. *See Smith v. Brutger Cos.*, 569 N. W.2d 408, 413 (Minn. 1997) (negligent misrepresentation); *Perl v. St. Paul Fire & Marine Ins. Co.*, 345 N. W.2d 209, 213 (Minn. 1984) (constructive fraud); *Midland Nat'l Bank of Minneapolis v. Perranoski*, 299 N.W.2d 404, 411 (Minn. 1980) (fraudulent misrepresentation).

quately pled fraudulent concealment under Minnesota law. *Id.* at 331. With respect to fraudulent and negligent misrepresentation, this court observed:

> Under Minnesota law both require proof that the plaintiff justifiably relied on the defendant's misleading statements. Whether a plaintiff's reliance was justifiable is determined in light of the specific information and experience it had. One can only justifiably rely on a statement which conflicts with the provisions of a written agreement it has signed if the agreement is couched in ambiguous legal language which a layman could reasonably believe supported the representation.

Id. at 331 (quotation omitted). The court concluded,

> To determine whether Superior justifiably relied on the oral assurances allegedly made by the Union, the trier of fact would have to determine whether the contractual language in the CBA was ambiguous enough for a layman reasonably to believe that it was not contrary to the representations on which Superior claims it relied. This would require the trier of fact to examine the provisions in [the CBA] . . . . Since Superior has the burden under Minnesota law to establish justifiable reliance, it would have to show that all of the cited provisions [of the CBA] could plausibly be read together to be consistent with its alleged understanding of its fringe benefit obligations. Adjudication of the dispute and resolution of the third party claims will necessarily involve interpretation of the CBA.

Id. at 332 (citations omitted). Similarly here, the question of whether the Players can show that they reasonably relied on the lack of a warning that StarCaps contained bumetanide cannot be ascertained apart from the terms of the Policy, specifically section eight, entitled "Masking Agents and Supplements" and Appendix G, entitled "Supplements." Because resolving the Players' misrepresentation claims will require interpretation of the Policy, they are preempted by section 301.

The Players' intentional infliction of emotional distress claim based on the NFL's failure to warn them that StarCaps contained bumetanide is also preempted. Under Minnesota law, "[t]o prove the intentional infliction of emotional distress, respondent must show appellant's conduct (1) was extreme and outrageous; (2) was intentional or reckless; (3) caused emotional distress; and that the emotional distress caused by appellant (4) was severe." *Wenigar v. Johnson*, 712 N.W.2d 190, 207 (Minn. Ct. App. 2006). However, one can only evaluate the outrageousness of the NFL's conduct, not disclosing to the Players that StarCaps contained bumetanide, in light of what the parties have agreed to in the Policy. Because the claim hinges on interpretation of the Policy, it is subject to preemption under section 301.

As to the Players' "Vicarious Liability/Respondeat Superior" claim, they allege:

> [a]t all times relevant to this litigation, Defendants Lombardo, Finkle, and Birch were agents or employees of the NFL acting within the scope of their employment by, or responsibilities to, Defendant NFL and in furtherance of Defendants' business. As Defendants

> Lombardo, Finkle and Birch's employer or nominal employer, Defendant NFL is responsible for the individual Defendants' actions and responsibilities within the scope of their employment and/or responsibilities. As a result of Defendants Lombardo, Finkle and Birch's torts within the scope of their employment with, or responsibilities to, Defendant NFL as alleged above . . . .

(Am. Compl. ¶ 93-94.) Here, the Players are not seeking to impose separate tort liability on the NFL. Rather, they are premising liability on the torts of its employees—the individual defendants—based on their employment with the NFL. *See Urban v. Am. Legion Dep't of Minn.*, 723 N.W.2d 1, 8 (Minn. 2006) ("[V]icarious liability is a principle whereby responsibility is imposed on the master who is not directly at fault." (quotation omitted)). Because we have concluded that each of the underlying tort claims is preempted by section 301, we need not further address vicarious liability.

III.

The Union seeks to vacate the arbitration awards, affirming the NFL's suspension of the five players who tested positive for bumetanide, pursuant to section 301. In reviewing a district court's order confirming arbitration awards, we review conclusions of law de novo and findings of fact for clear error. *Winfrey v. Simmons Foods, Inc.*, 495 F.3d 549, 551 (8th Cir. 2007). However, "[o]ur review is restricted by the great deference accorded arbitration awards. The award must be confirmed so long as the arbitrator is even arguably construing or applying the [agreement]

even if the court thinks that his interpretation of the agreement is in error." *Id.* (quotations omitted).

We have noted that, "[a]lthough an arbitrator has broad authority, the arbitrator is not wholly free from judicial review. An arbitrator's award can be vacated for the reasons provided in the Federal Arbitration Act (FAA)." *Schoch v. InfoUSA, Inc.*, 341 F.3d 785, 788 (8th Cir. 2003) (citing 9 U.S.C. § 10(a) (listing several reasons to vacate including: corruption, fraud, undue means, evident partiality, misconduct, or ultra vires acts)).

> In addition to the statutory reasons for vacating arbitration awards, our court has recognized two extremely narrow judicially created standards for vacating an arbitration award. First, an arbitrator's award can be vacated if it is completely irrational, meaning it fails to draw its essence from the agreement. . . . The second judicially created standard for vacating an arbitration award is when the award evidence[s] a manifest disregard for the law.

Id. (quotations omitted).

The Union asserts three bases for vacating the arbitration awards: (1) the awards ignore the Policy provision requiring that Dr. Lombardo independently determine whether to recommend players for discipline which was violated as a result of the NFL's interference, (2) the awards violate public policy requiring both the NFL and Dr. Lombardo to disclose a specific, potentially lethal health risk otherwise unknown to NFL players, and (3) the awards were issued by a biased arbitrator in light of Pash's undisclosed legal advice to the Vikings and the NFL with regard to the Players. We address each in turn.

First, the Union argues that the awards fail to draw their essence from the Policy. Specifically, the Union asserts that the arbitrator ignored the provision in the Policy providing Dr. Lombardo with the discretion to determine whether a positive test result for a banned diuretic (like bumetanide) should be referred for discipline. The Union argues that Dr. Lombardo did not possess the requisite discretion to determine whether to refer the five players for discipline because Birch had previously instructed Dr. Lombardo to do so. "An arbitrator's award draws its essence from the [parties' agreement] as long as it is derived from the agreement, viewed in light of its language, its context, and any other indicia of the parties' intention." *Schoch*, 341 F.3d at 788 (quotation omitted). However, "[a]n arbitrator is not free to ignore or abandon the plain language of the parties' agreement." *Gas Aggregation Servs., Inc. v. Howard Avista Energy, LLC*, 319 F.3d 1060, 1065 (8th Cir. 2003); *see Keebler Co. v. Milk Drivers & Dairy Employees Union, Local No. 471*, 80 F.3d 284, 288 n.4 (8th Cir. 1996).

Under the 2006 Policy, Dr. Lombardo served as the "Advisor," and "ha[d] the sole discretion to make determinations regarding steroid-related matters, including medical evaluations and testing." NFL Players Association, National Football League Policy on Anabolic Steroids and Related Substances § 2 (2006). Dr. Lombardo testified that, in 2006, he did not refer any of the players who tested positive for bumetanide for discipline. (No. 09-2249, Appellant App. 209.) Sometime between December 2006 and the start of the 2007-08 NFL season, Birch directed Dr. Lombardo to forward for discipline all positive test results for diuretics. (*Id.* at 224-26, 256.) Dr. Lombardo complied

with Birch's request. (*Id.* at 224-25.) The Policy was subsequently amended. Under the 2008 Policy, which was in effect at the time that the five players tested positive for bumetanide and Dr. Lombardo referred them for discipline, Dr. Lombardo's title was Independent Administrator. Policy, § 2. The Policy provides: "Neither the NFL, the [Union], nor any NFL Member Club directs the specific testing schedule, decides which players will be tested, or influences the Independent Administrator's determination whether a potential violation has occurred and should be referred for further action." *Id.* Dr. Lombardo testified that, absent Birch's directive prior to the 2007-08 season, Dr. Lombardo would not have referred any of the five players involved in this case for discipline as a result of their positive test results for bumetanide. (No. 09-2249, Appellant App. 233-34.)

The Union argues that Birch's directive violated both the provisions of the 2006 Policy and the 2008 Policy which vested Dr. Lombardo with the discretion to determine which positive results were referred for discipline. The Union further asserts that the arbitrator's failure to recognize these violations means that he ignored the policies in issuing the arbitration awards. However, the Union's allegations constitute a challenge to the actions of Birch and the NFL, not those of the arbitrator. The Union admits that it did not learn of Birch's directive until discovery in this case, which took place after the arbitration hearing and decision. There is no indication that the arbitrator knew of Birch's direction when he issued the awards. Thus, it is clear that the arbitrator did not "ignore" the provisions of either the 2006 or 2008 Policies when he issued the awards. Therefore, Birch's directive is

not a reason to vacate the arbitrator's award in this case.

Second, the Union argues that upholding the awards must be vacated because the awards approve of the NFL's and Dr. Lombardo's failure to warn NFL players that StarCaps, an over-the-counter supplement, contained bumetanide, a potentially seriously harmful substance, in violation of public policy. "If the [Policy] as interpreted by [the arbitrator] violates some explicit public policy, [courts] are obliged to refrain from enforcing it." *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum, & Plastic Workers*, 461 U.S. 757, 766 (1983). However, "[s]uch a public policy . . . must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *Id.* (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)); *see United Food & Commercial Workers' Union Local 655 v. St. John's Mercy Health Sys.*, 448 F.3d 1030, 1032 (8th Cir. 2006) ("An award should of course not be enforced if it would violate some explicit public policy."). The Supreme Court has further instructed that "the public policy exception is narrow . . . ." *E. Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 63 (2000); *see MidAm. Energy Co. v. Int'l Bhd. of Elec. Workers Local 499*, 345 F.3d 616, 619 (8th Cir. 2003).

The Union argues that the awards violated the public policy of governing New York law which imposes a duty on the NFL as a fiduciary in connection with the Policy and as an employer to disclose the presence of bumetanide, a prescription diuretic, in

StarCaps.[15] The Union further asserts that Dr. Lombardo had a duty to issue the same disclosure as a fiduciary in connection with his role as Independent Administrator of the Policy and as a physician. However, the Union has offered no authority clearly articulating such a public policy under New York law. Because the Union has failed to demonstrate an explicit, well defined, and dominant public policy requiring such a disclosure, *see W.R. Grace & Co.*, 461 U.S. at 766; *Ace Elec. Contractors*, 414 F.3d at 900, this narrow ground does not provide a basis for vacating the awards.

Finally, the Union argues that the awards must be vacated because they are tainted by the arbitrator's evident partiality. Specifically the Union asserts that it first learned that the arbitrator gave both the Vikings and the Commissioner legal advice on the subject matter of the arbitrations, during discovery in this case.

The FAA allows a court to vacate an award for an arbitrator's "evident partiality." 9 U.S.C. § 10(a)(2). Evident partiality exists where the non-disclosure at issue "*objectively* demonstrate[s] such a degree of partiality that a reasonable person could assume that the arbitrator had improper motives." *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742, 750 (8th Cir. 2003) (quotation omitted). This is a "heavy burden." *Choice Hotels Int'l, Inc. v. SM Prop. Mgmt., LLC*, 519

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[15] The CBA provides that "[t]o the extent that federal law does not govern the implementation of this Agreement, this Agreement shall be construed and interpreted under, and shall be governed by, the laws applicable to contracts made and performed in the State of New York." CBA, art. LIX. The NFL does not dispute that New York law governs this issue.

F.3d 200, 212 (4th Cir. 2008) (quoting *Three S. Del., Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 527 (4th Cir. 2007)). This standard "is not made out by the mere appearance of bias." 3 Fed. Proc. § 4:119 (Lawyers ed. 2009).

First, "the parties to an arbitration choose their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen." *Winfrey*, 495 F.3d at 551 (quotation omitted). The Union agreed in the Policy that "the Commissioner or his designee will preside as Hearing Officer." Policy, § 10. Here, the designee was Jeffrey Pash, the NFL's general counsel, and it is undisputed that there was no objection to him serving as arbitrator prior to this lawsuit. The Union explains this failure as a result of the fact that they did not learn of the basis for Pash's alleged evident partiality until discovery in this case. During discovery, the Union learned that Pash met with the Vikings three times between October 23, 2008, and early November 2008, and, at some point, discussed the Players. Specifically, Pash described his statements to the Vikings as

> in the context of what I understood to be and was aware of threats of litigation that could arise out of this proceeding. And so I was framing my advice in that context . . . . I can't say that . . . I knew . . . at the very first that the Williams players . . . were involved. But I believe that at some point I knew that they were involved.

(No. 09-2249, Defs.-Appellees' Supp. App. 234.) Pash became aware of the Players' litigation threats from their attorney, Mr. Ginsberg. (*Id.*) Even if prior to discovery in this case the Union was not specifically

aware of Pash's communication of the information he received from the Players' counsel to the Vikings and Commissioner, the Union cannot reasonably claim to be surprised that such discussion occurred given Pash's position as general counsel for the NFL. Thus, the Union waived any objection as to Pash's evident partiality premised on his communication of litigation threats to the NFL and the Vikings, which he learned of from the Players' counsel, by failing to object to the general counsel for the NFL serving as arbitrator.

Second, even if the Union has not waived this issue, the Union has failed to carry the "heavy burden," *Choice Hotels Int'l*, 519 F.3d at 212, of demonstrating that Pash's actions show evident partiality as the Union has not even alleged that Pash's actions were motivated by "improper motives." *Dow Corning*, 335 F.3d at 750. Either the Union has: (1) waived its objection to Pash serving as arbitrator by agreeing in the CBA that the Commissioner's designee (which is what Pash was) could serve as arbitrator or (2) failed to demonstrate evident partiality on Pash's part. Therefore, we decline to vacate the awards on this basis. In sum, we reject each of the Union's arguments for vacating the awards. Accordingly, we affirm the district court's order confirming the awards.

IV.

For the foregoing reasons, we affirm the judgment of the district court in all respects.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

National Football League Players Association,

Plaintiff,

v.

National Football League, and National Football League Management Council

Defendants.

Civil No. 08-6254 (PAM/JJG)

MEMORANDUM AND ORDER

Kevin Williams and, Pat Williams

Plaintiffs,

v.

National Football League, John Lombardo, M.D., Brian Finkle, and Adolpho Birch,

Defendants.

Civil No. 08-6255 (PAM/JJG)

This matter is before the Court on cross-Motions for Summary Judgment filed by all parties in these related cases.

BACKGROUND

In July and August 2008, players in the National Football League ("NFL") submitted to random testing for steroids and other substances in accordance with the NFL's Policy on Anabolic Steroids and Related Substances (the "Policy"). (Greenspan Decl. Ex. 1 (hereinafter "Policy") at 4 ("Each week during the preseason and regular season, ten (10) players on every team will be tested.").) The Policy's testing regimen is administered by Defendant Dr. John Lombardo, who is denominated the "Independent Administrator" of the Policy. (*Id.* at Appx. B.) As the Independent Administrator, Lombardo has "the sole discretion to make determinations regarding the method by which players will be subjected to testing each week; selecting which players will be tested each week; deciding when tests will be administered; . . . analyzing test results; . . . and certifying violations for disciplinary or administrative action." (*Id.* ¶ 2.) He is also responsible for "consult[ing] with players and Club physicians, oversee[ing] the development of educational materials, [and] participat[ing] in research on steroids . . . ." (*Id.*)

In late September and early October 2008, five players—Kevin Williams and Pat Williams of the Minnesota Vikings and Charles Grant, Deuce McAllister, and Will Smith of the New Orleans Saints—were informed that their samples had tested positive for bumetanide, a prescription diuretic that is banned under the Policy because it may mask the presence of ster-

oids.[1] The Policy provides that "[t]he *first* time a player violates this Policy by testing positive [for a banned substance] . . . he will be suspended without pay for a minimum of four regular and/or postseason games." (*Id.* ¶ 6 (emphasis in original).) Thus, the NFL suspended the players for four games.

The players appealed their suspensions. Under the terms of the Policy, appeals are presented at a hearing before the Commissioner or his designee at which the player may be represented by counsel and may present evidence. (*Id.* ¶ 10.) The Policy further provides that the Hearing Officer's written decision "will constitute a full, final, and complete disposition of the appeal" and "will be binding on all parties." (*Id.*) The Commissioner designated Defendant Jeffrey Pash, the NFL's chief legal officer, to be the Hearing Officer in the appeals.[2]

At the hearing, the players presented evidence that they took an over-the-counter dietary supplement called "StarCaps," which ostensibly provides weight-loss benefits. Although bumetanide is not listed as an ingredient in StarCaps, the evidence established that the StarCaps the players took contained bumetanide. Thus, the players all unknowingly ingested bumetanide.

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[1] There is no allegation that any of the players tested positive for any steroid.

[2] The Vikings players' appeal was heard together and the Saints players' appeal was heard together. Thus, there are two hearings and arbitration records at issue. However, because the parties stipulated that the evidence presented at one hearing would be available for consideration at the other hearing, the Court will discuss a single "hearing."

Under normal circumstances, the unknowing ingestion of a banned substance will not excuse a violation of the Policy. The Policy warns repeatedly that players are responsible for what is in their bodies, and states that "a positive test result will not be excused because a player was unaware that he was taking a [banned substance]." (*Id.* ¶ 3.E.) The players argued, however, that theirs was not a normal circumstance. The evidence established that Lombardo and the NFL knew in 2006 that at least some StarCaps capsules contained bumetanide. Indeed, after several players tested positive for bumetanide after taking StarCaps in 2006, Lombardo and the NFL asked an independent laboratory to analyze StarCaps for the presence of bumetanide.[3] The laboratory found bumetanide in StarCaps and informed Birch and Lombardo of the results. The laboratory also published the results of the tests in the November/December 2007 *Journal of Analytical Toxicology*. After this testing, Defendant Adolpho Birch, the NFL's Vice President of Law and Labor Policy, informed the National Football League Players Association ("NFLPA" or "Union") that players were prohibited from providing endorsements for Balanced Health Products, the distributor of StarCaps. (Saints players Arbitration R. Ex. 53.) Birch also sent a memorandum to each team's president, general manager, and head athletic trainer that players were not to endorse Balanced Health Products. (*Id.* Ex. 52.) Neither Lombardo nor Birch, however, told the teams, trainers, agents, or players that StarCaps contained bumetanide or any banned substance. Moreover, despite the lab director's request that the NFL report

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[3] Lombardo did not refer for discipline any players who tested positive for bumetanide in 2006. (Lombardo Dep. at 38.)

the information about StarCaps to the Food & Drug Administration ("FDA"), Birch declined to do so. (Vikings players Appeal Hr'g T. at 238 (Lombardo Test.).)

In decisions dated December 2, 2008, Mr. Pash upheld the suspensions of all five players. (Saints players Arbitration R. Ex. 1; Vikings players Arbitration R. Ex. 1.) He discussed the Policy's position on dietary supplements, noting that players received repeated warnings that over-the-counter supplements might contain ingredients not listed on the label and that a positive test would not be excused because the supplement's ingredient list did not disclose the presence of a banned substance. (*See, e.g.*, Vikings players Arbitration R. Ex. 1 at ¶¶ 7-9 (discussing numerous memoranda to players regarding supplements).) Mr. Pash then turned to the language of the Policy as applied to the facts at hand:

> There is no question that the policy embodies a collectively-bargained rule of strict liability—a rule that players alone are responsible for what is in their bodies; that inadvertent or unknowing use of a prohibited substance will not excuse a positive test; and that supplements are used at the player's own risk. Similarly, there is no question that at the time that he used StarCaps as well as at the time of the hearing, each player clearly understood that rule and what it means.

(*Id.* at 6.)

None of the players contested their positive test results. They instead argued that those positive results should be excused "because the NFL and Dr. Lombardo were aware that StarCaps contained an undisclosed banned substance, bumetanide, but did

not specifically advise NFL players of this fact." (*Id.*) As Mr. Pash put it in his decisions on the appeals, "even though [none of the] player[s] contacted Dr. Lombardo about StarCaps (as the Policy directs them to do), they contend that where specific evidence is available about a particular product, a specific warning is required, and the failure to extend such a warning should excuse any violation of the Policy associated with that product." (*Id.*) Mr. Pash found that the players' position "flies in the face of nearly two decades of history" because the Policy has always adhered to the "fundamental principle" of strict liability that "puts the burden on players to be responsible and accountable for what is in their bodies." (*Id.* at 7) Mr. Pash thus concluded that the language of the Policy required that the suspensions be upheld. (*Id.* at 9.)

Kevin Williams and Pat Williams filed suit in Minnesota state court the day after Mr. Pash issued his decision. The state-court judge issued a temporary restraining order ("TRO") blocking the suspensions. The next day, the NFLPA, on behalf of the Saints players and the Williamses, brought suit in federal court and the NFL removed the Williamses' state lawsuit to federal court. This Court ultimately granted the NFLPA's motion for a preliminary injunction and declined to overturn the TRO entered in state court, thus allowing the players to continue playing until the end of the NFL's season. The Court found that the players and Union had shown a "substantial question" on the merits of their claim that Mr. Pash was biased and on their claim that Mr. Pash's decision was contrary to public policy (Order of Dec. 11, 2008, at 12, 16), but that the players and Union had failed to show a substantial question on the merits of their claim

that the decisions did not draw their essence from the Policy. (*Id.* at 14.) These determinations were necessarily preliminary, however, and do not constitute law of the case for the purposes of the instant Motions. *SEC v. Zahareas*, 272 F.3d 1102, 1105 (8th Cir. 2001).

After granting the preliminary relief the players and Union requested, the Court ordered the parties to engage in expedited discovery and thereafter to submit dispositive motions, if appropriate. Despite the Court's clear guidance that discovery was necessary, the parties (and the NFL in particular) engaged in what can only be called gamesmanship, requiring the Magistrate Judge to extend far greater oversight of the discovery process than should otherwise have been required. Not only are such obstructive litigation tactics unnecessary and expensive, but they were contrary to the explicit dictates of the Court. The parties are fortunate that the Magistrate Judge so ably shepherded discovery and mediated the parties' disputes. This Court would not have looked favorably on the parties' conduct should it have had occasion to consider the consequences of that conduct.

Discovery revealed additional facts not found in the arbitration record. After the Williamses were informed of their positive test results, they threatened to bring a lawsuit claiming, among other things, a violation of the Americans with Disabilities Act. In response to these threats, Mr. Pash, in his role as the NFL's chief legal officer, gave legal advice to the NFL and to the Vikings. According to the NFLPA and the Williamses, Mr. Pash's early involvement in the subject matter of the arbitrations further bolsters their claim that Mr. Pash was biased and should not have arbitrated the appeals.

Discovery also revealed a memorandum from the NFLPA to players' agents regarding the distributor of StarCaps. In that memorandum, the NFLPA informed the agents that "Balanced Health Products, which distributes StarCaps, has been added to the list of prohibited dietary supplement companies. Players are prohibited from participating in any endorsement agreement with this company *or using any of their products*." (12/20/2006 Robinson memo (emphasis added).) The NFL contends that this memorandum eviscerates the players' claims that they were not informed about StarCaps prior to their positive tests.

The final relevant evidence surrounds the first "cluster" of positive bumetanide tests in 2006. These positive tests and the tested players' statements that they took StarCaps prior to the positive tests gave rise to Lombardo's request that a laboratory analyze StarCaps for the presence of bumetanide, as discussed above. As noted, Lombardo did not refer for discipline any player who tested positive for bumetanide in 2006. Sometime in late 2006 or 2007, Birch communicated with Lombardo about Lombardo's duties under the Policy. (Lombardo Dep. at 114-15, 118; Birch Dep. at 45-46.) Birch told Lombardo that Lombardo did not have the discretion under the Policy to determine whom to refer for discipline, but only to determine whom to test. (Lombardo Dep. at 114-15; Birch Dep. at 45-46.) In other words, Birch told Lombardo that if a player tested positive for a banned substance then, assuming the player had no therapeutic reason to be taking the banned substance, the player must be referred to the NFL for discipline. (*See* Birch Dep. at 65 ("I advised [Lombardo] that if this situation comes up, he is to refer those matters for discipline.").) The play-

ers contend that this communication between Birch and Lombardo constitutes interference with Lombardo's discretion and is specifically prohibited by the Policy.

B. Claims

The NFLPA raises a single claim in its Complaint, seeking to vacate the arbitration award under a theory of breach of contract. The NFLPA contends that the arbitration awards must be overturned because they are contrary to public policy, condone the NFL's breaches of fiduciary duty to the players, are contrary to the essence of the Policy, and were rendered by a biased arbitrator.

The Williamses' Amended Complaint contains thirteen counts, all brought under Minnesota common law or statutes. Count I seeks an injunction against the Williamses' suspensions. Count II alleges a breach of fiduciary duty. Count III contends that the NFL aided and abetted breaches of fiduciary duty. Count IV raises a violation of public policy. Counts V and VI are claims of fraud and constructive fraud. Counts VII, VIII, and IX raise negligent misrepresentation, negligence, and gross negligence claims. Count X alleges intentional infliction of emotional distress ("IIED"). Count XI contends that the NFL is vicariously liable for the torts committed by the individual Defendants. Count XII asserts that Defendants violated Minnesota's Drug and Alcohol Testing in the Workplace Act ("DATWA"), Minn. Stat. § 181.950 *et seq.*, and Count XIII contends that Defendants violated Minnesota's Consumable Products Act ("CPA"), Minn. Stat. § 181.938. The Amended Complaint claims damages in excess of $10 million. (Am. Compl. ¶ 105.)

C. Standard of Review

1. Preemption

The NFLPA's claims arise under § 301 of the Labor Management Relations Act ("LMRA"), which provides for federal court jurisdiction over all actions for the breach of a labor contract such as the Policy. 29 U.S.C. § 185(a). Likewise, the Williamses' common-law claims arise under § 301, although they are brought as state-law claims.

Section 301 preempts nearly every state cause of action involving a collective bargaining agreement. *See Oberkramer v. IBEW-NECA Serv. Ctr., Inc.*, 151 F.3d 752, 756 (8th Cir. 1998) (noting that claims that "are 'substantially dependent' upon an analysis of the terms or provisions of a collective bargaining agreement or are 'inextricably intertwined' with consideration of the terms or provisions of a collective bargaining agreement" are preempted by § 301) (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213, 220 (1985)). There can be no question that the Williamses' common-law claims depend on an analysis of the terms of the Policy and are inextricably intertwined with the Policy. They are therefore preempted and the Court will construe these claims as § 301 claims. *See Allis-Chalmers*, 471 U.S. at 220 (holding that where state-law claim requires analysis of terms of labor agreement, court may either treat claim as a § 301 claim or dismiss claim as preempted).

However, the Williamses' statutory claims are different from the common-law claims. The statutory claims exist independently of the Policy, because even if the NFL was acting pursuant to the Policy, those actions may still violate state law. "Clearly, § 301 does not grant the parties to a collective-bargaining agree-

ment the ability to contract for what is illegal under state law. . . . [Therefore] it would be inconsistent with congressional intent . . . to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." *Allis Chalmers*, 471 U.S. at 212. Both DATWA and the CPA proscribe conduct or establish rights and obligations that exist independently of the Policy, and thus those claims are not preempted.

2. Federal Arbitration Act

The collectively bargained-for Policy requires the parties to submit appeals of discipline decisions to arbitration. Thus, this Court's review of the arbitrator's decision is circumscribed by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10, which allows a court to set aside an arbitration award only if that award "was procured by fraud, corruption, or undue means," § 10(a)(1), or when "there was evident partiality in the arbitrators." *Id.* § 10(a)(2). Both the NFLPA and the Williamses argue that the Court should set aside the arbitration awards at issue because of the NFL's alleged bad conduct in not informing players about the presence of bumetanide in StarCaps and because of arbitrator Pash's alleged partiality. They contend that public policy mandates that arbitration awards that condone breaches of fiduciary duties be vacated. They also argue that the awards violate the essence of the Policy and must be set aside on that basis.

The Court's review of the arbitration decision is extremely limited. The Court must afford the arbitrator "an extraordinary level of deference" and must confirm the award as long as "the arbitrator was even arguably construing or applying the contract and acting within the scope of his authority." *Stark v. Sandberg*,

Phoenix & von Gontard, P.C., 381 F.3d 793, 798 (8th Cir. 2004). Further, the Court may vacate the decisions "only for the reasons enumerated in the FAA." *Crawford Group, Inc. v. Holekamp*, 543 F.3d 971, 976 (8th Cir. 2008) (citing, *inter alia*, *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1403 (2008)).

D. Merits

1. Essence of the CBA

As the Court noted in the Order granting the preliminary injunction, an arbitration award that does not "draw[] its essence from the collective bargaining agreement" is not entitled to deference from the reviewing Court. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987). The Court's authority to reverse an arbitration award for failure to comply with the Policy is "exceptionally narrow." *Coca-Cola Bottling Co. of St. Louis v. Teamsters Local Union No. 688*, 959 F.2d 1438, 1440 (8th Cir. 1992). "[A]s long as the arbitrator is even arguably construing or applying the [Policy] and acting within the scope of his authority," the Court's determination that the arbitrator "committed serious error does not suffice to overturn his decision." *Misco*, 484 U.S. at 38.

The NFLPA has abandoned the arguments it raised unsuccessfully in the preliminary injunction hearing on this point. (*See* Order of Dec. 11, 2008, at 13-14.) It now contends that Birch's alleged interference with Lombardo's discretion means that the awards violate the essence of the Policy. Essentially, the Union's argument is that, if Birch had not interfered with Lombardo's ability to exercise his discretion to refer players for discipline, Lombardo would not have referred these players for discipline. They maintain that the Policy requires that neither the NFL nor

the NFLPA influence Lombardo's determination to refer players for discipline. (*See* Policy at 2-3.)

The provision prohibiting any influence on Lombardo was added in 2008, at least one year after Birch's alleged interference with Lombardo. Thus, it is difficult to ascertain how Mr. Pash's decision sanctioned any violation of the Policy when what Birch did was not in contravention of the Policy at the time he did it.

However, even if Birch impermissibly interfered with Lombardo's discretion, and even if absent that interference the players here would not have been disciplined, Mr. Pash's decision still draws its essence from the Policy. The Policy is unequivocal: players are responsible for what is in their bodies, and inadvertent ingestion of a banned substance will not excuse a positive test result. Thus, although it may have been Lombardo's personal, unofficial policy not to refer positive bumetanide tests for discipline prior to his conversation with Birch, that unofficial policy is not at issue here. What is at issue is the Policy itself. There can be no doubt that Mr. Pash's decision construed the language in the Policy, applied the language of the Policy, and that Mr. Pash acted within the scope of his discretion under the Policy. Thus, his decisions do not fail to draw their essence from the collective bargaining agreement.

2. Partiality of Hearing Officer

The FAA provides specifically that an arbitration award may be set aside "where there was evident partiality or corruption in the arbitrator[]." 9 U.S.C. § 10(a)(2); *see also Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358-59 (6th Cir. 1989) (applying FAA's "evident partiality" standard to arbitration award in-

volving collective bargaining agreement); *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 49 (2d Cir. 1984) (same). Because the NFLPA agreed in the Policy that either the Commissioner or his designee would preside over appeal hearings, the NFLPA agreed to a certain amount of partiality in the arbitrator. Thus, "the award should be confirmed unless the objecting party proves that the arbitrator's partiality prejudicially affected the award." *Winfrey v. Simmons Foods, Inc.*, 495 F.3d 549, 551 (8th Cir. 2007).

In the Order granting the preliminary injunction, the Court determined that the players had established a substantial question as to Mr. Pash's partiality. (Order of Dec. 11, 2008, at 12.) The Court's determination rested on two factual bases: first, counsel's representation that at one appeal hearing Mr. Pash refused to allow questioning of Birch, his subordinate, as to Mr. Pash's (or his office's) involvement in the StarCaps investigation and its aftermath; and second, the fact that Mr. Pash did not discuss Lombardo's testimony that if he had been asked about StarCaps, he would have merely warned the player away from supplements in general but would not have told the player about the presence of bumetanide in StarCaps. Further discovery has established that neither basis is borne out by the record.

The Court has reviewed Birch's testimony from the appeal hearings. There is nothing in that testimony or in Mr. Pash's rulings regarding that testimony that in any way evidences bias on the part of Mr. Pash. The objection noted by counsel in the preliminary injunction hearing simply does not exist.

Similarly, a full reading of Lombardo's hearing testimony establishes that he was willing to tell players about the presence of bumetanide in StarCaps. In the Saints players' hearing, Lombardo was asked why he would not tell a player that StarCaps contains bumetanide. He responded, "I would tell them that they have been found to have Bumetanide in it." (Saints players Hr'g T. 114.) He reiterated, "I would tell them that they were found to have a diuretic in them, which is banned." (*Id.* at 115.) Mr. Pash's discussion of Lombardo's testimony is therefore full and fair, and the players and the Union cannot establish bias on this basis.

The players and the Union now argue that additional evidence establishes Mr. Pash's bias. They claim that Mr. Pash "secretly" gave legal advice to the NFL and to the Vikings regarding the subject matter of the appeals, and that he was therefore disqualified from acting as a hearing officer. Mr. Pash is the NFL's chief legal officer. As such, he will undoubtedly be asked to give legal advice to the NFL or to its member teams when a player threatens legal action. The fact that Mr. Pash gave advice in this situation was clearly foreseeable, and having not objected to Mr. Pash serving as the arbitrator, the players and the Union cannot now complain about his service. Moreover, the evidence shows that not only did the players and the Union know that Mr. Pash was giving legal advice to the NFL, but they requested that he serve as Hearing Officer specifically because of his involvement. Even if Mr. Pash's involvement could somehow establish bias, which is doubtful, the players and the Union have waived any such claim. *Kiernan v. Piper Jaffray Cos.*, 137 F.3d 588, 593 (8th Cir. 1988).

Mr. Pash was not a partial arbitrator and the Court will not set aside his decision on this basis.

3. Public policy

The NFLPA argues that Mr. Pash's decisions must be set aside because they sanction Lombardo's and the NFL's breaches of fiduciary duty. Specifically, the NFLPA contends that once Lombardo and the NFL knew that StarCaps contained bumetanide, they owed a duty under New York law to give the players that information. The Williamses' fiduciary duty claims arise under Minnesota law, but otherwise are similar to the NFLPA's claims. Both the Union and the players argue that there is an explicit public policy against breaches of fiduciary duties and that the decisions should be overturned because they are contrary to this public policy.

Where, as here, the decisions at issue draw their essence from the parties' collectively bargained agreement, the Court must treat those decisions as if they represented an agreement between the NFLPA and the NFL as to whether the Policy requires the disclosure the Union and the players contend was required here. *Eastern Assoc. Coal Cos. v. United Mine Workers of Am.*, 531 U.S. 57, 62 (2000). Put differently, the decisions are "not distinguishable from the contractual agreement." *Id.* The Court must then decide whether the Policy as interpreted by Mr. Pash "violates some explicit public policy" that is "well defined and dominant" and can be "ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983). The question is not whether any behavior by the parties to the Policy violates public policy, but rather whether

the Policy itself violates public policy. *MidAm. Energy Co. v. Int'l Bhd. of Elec. Workers Local 499*, 345 F.3d 616, 620 (8th Cir. 2003). If the Policy does violate an explicit public policy, the Court is "obliged to refrain from enforcing it." *W.R. Grace*, 461 U.S. at 766. To prevail on this claim the Union and the players must therefore show that a fiduciary duty exists and was breached, that fiduciary duties are an explicit public policy, and that the Policy as interpreted by Mr. Pash violates that public policy by condoning the breach of fiduciary duties.

The NFLPA and the players argue that Defendants breached their duties to the players in two ways. First, they contend that Lombardo's statement that he would not have told a player inquiring about StarCaps that StarCaps contains bumetanide breached not only Lombardo's fiduciary duties to the players but also Lombardo's duties as a physician. Second, they claim that the NFL Supplement Hotline (the "Hotline")[4] gave incorrect information to players about StarCaps and that the NFL, acting through Birch, did nothing to correct the Hotline's actions.

As discussed above, Lombardo's testimony establishes that, had a player called him to inquire about StarCaps, Lombardo would have told the player that StarCaps contained bumetanide. There can be no claim of breach of fiduciary duty arising out of Lombardo's alleged refusal to divulge that information. In addition, Lombardo's decision not to publish specific warnings about StarCaps does not violate his duties to players. Lombardo testified that he decided

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[4] The NFL and the NFLPA created the Hotline to provide players "with confidential and accurate information about" supplements. (Greenspan Decl. Ex. 19.)

to send a general warning about weigh-loss supplements rather than about StarCaps in particular because "the problem is the whole area of weigh reduction products." (Lombardo Dep. at 161.) Thus, as Mr. Pash found, Lombardo exercised his discretion under the Policy to educate players, and did so in a general way because he believed that all weigh-reduction products, not just StarCaps, carried risks. The NFLPA and the players may disagree with Lombardo's conclusion, but under the terms of the Policy, the decision on this issue was his to make. Absent a showing that the decision was outrageous or without any foundation, the Union and the players cannot establish that the decision constituted a violation of whatever fiduciary duties Lombardo may have had.

The NFLPA also contends that the Hotline gave inaccurate information to players regarding StarCaps, that Birch knew the Hotline was giving inaccurate information and did nothing to correct the situation, and that this constitutes a breach of the NFL's fiduciary duties to the players.

The evidence shows that Birch communicated with the Hotline in 2006 regarding StarCaps, asking whether the Hotline had received inquiries about this particular substance. The Hotline informed Birch that one player had inquired and had been told that, while StarCaps was not banned, the player should avoid taking any supplement because the label might not be accurate and it might in fact contain a banned substance. (Birch Dep. at 106.) Birch testified that he did not ask the Hotline to give any more specific information to players about StarCaps. (*Id.* at 110.)

The information the Hotline gave the player is undisputedly accurate. The NFLPA and the players

contend that the Hotline should have informed players about the presence of bumetanide in StarCaps once the NFL was aware that StarCaps contained bumetanide. While this specific warning might have been preferable, it is not a breach of fiduciary duties to tell players that all supplements are risky and that players should not rely on any supplement's list of ingredients because that list might be incomplete. The NFL's decision regarding the warnings to give players is not unreasonable.

The administration of the Hotline presents squarely the troubling issues brought forward by this case. There is no doubt that it would have been preferable for the NFL to communicate with players specifically about the presence of bumetanide in StarCaps. The NFL's failure to do so is baffling, but it is not a breach of the NFL's duties to its players. It is clear that this situation arose because the parties to these cases do not trust each other. The NFL does not trust the Union or the players. The players and the Union do not trust the NFL. No one believes that the opposing parties have any common interests. The situation is deplorable and leads to suspicion and the sort of no-holds-barred litigation tactics so clearly on view here.

Unlike the parties, the Court does not view each party's actions through the lens of suspicion. Through the Hotline, the NFL was attempting to tell players what they already knew: they should not take dietary supplements. NFL players are adults. They are warned repeatedly not to take dietary supplements and that such supplements may cause a positive test for a banned substance. (Greenspan Decl. Exs. 17-20; Policy Appx. F.) It is no doubt true that none of the

players here would have taken StarCaps if the NFL had issued a memo saying that StarCaps contained bumetanide. It is also likely that those players, having been warned not to take StarCaps in particular, would have turned to a different supplement to accomplish their weight-loss goals. There is certainly no guarantee that another supplement is any less likely to have a banned substance than is StarCaps, but despite the NFL's and Lombardo's repeated warnings about supplements, players continue to use them.

Mr. Pash determined that the Policy makes players responsible for what is in their bodies. He noted that, if the Union disagreed with this apportionment of liability, it is free to bargain for a different Policy. (Viking players Arbitration R. at 8.) The Union is, in fact, free to bargain for a clause that requires the NFL to inform players specifically when a supplement is found to contain a banned substance. The Policy as written does not contain such a requirement, however. More importantly, the absence of such a requirement does not sanction any breach of fiduciary duties on the part of the NFL or Lombardo.

Having failed to establish that a genuine issue of material fact exists as to whether the NFL or Lombardo breached any fiduciary duties, the NFLPA and the Williamses cannot succeed on their claim that the appeal decisions must be set aside as contrary to public policy. Thus, the NFLPA's Complaint must be dismissed. The Williamses, however, raise claims under Minnesota law that, as noted above, are not preempted by § 301. The claims are discussed below.

4. DATWA and CPA

DATWA sets forth explicit guidelines regarding when and how Minnesota employers can require their

employees to submit to drug testing. *See* Minn. Stat. § 181.951, subd. 1 ("An employer may not request or require an employee or job applicant to undergo drug and alcohol testing except as authorized in this section."). Among other things, DATWA provides that an employee may not be disciplined on the basis of an initial positive test and requires the employer to allow the employee the right to explain a positive test. *Id.* § 181.953(6) and (10)(a). The NFL concedes that its steroid testing procedures do not comply with the letter of Minnesota law, but argues that the differences are negligible and do not require the Court to invalidate the Williamses' positive tests for bumetanide. The NFL argues that DATWA allows for collective bargaining agreements to provide for protections that exceed DATWA's protections, and further contends that, whatever the merits of the Williamses' DATWA claims, they have failed to exhaust their administrative remedies and thus are precluded from bringing claims under DATWA.

The CPA prohibits a Minnesota employer from taking an adverse action against an employee because the employee "has engaged in the use or enjoyment of lawful consumable products, if the use or enjoyment takes place off the premises of the employer during nonworking hours." Minn. Stat. § 181.938, subd. 2. The Williamses argue that the CPA prohibits the NFL from disciplining them for taking StarCaps, which are a lawful product and were consumed outside of working hours. The NFL responds that the CPA allows employers to restrict the consumption of lawful products if that restriction is related to a bona fide occupational requirement, *id.* subd. 3(a)(1), and that the Pol-

icy's restrictions on the use of steroids and masking agents clearly falls within this exception.

Because the Williamses' state-law DATWA and CPA claims are the only claims remaining in the case, the Court must determine whether it has jurisdiction to consider the merits of the claims. The Williamses' Complaint was removed to this Court on the basis of the federal question jurisdiction provided by the preemption provision of the LMRA. The Court has determined, however, that all § 301 claims must be dismissed. Therefore, the Court does not have federal question jurisdiction over the Williamses' Amended Complaint. In addition, jurisdiction may not be founded on diversity of citizenship. The Williamses are residents of the state of Minnesota (Am. Compl. ¶¶ 2-3), and the NFL, as an unincorporated association of the member teams, is a citizen of each state in which its members are citizens. *Iowa Ins. Guar. Ass'n v. New England Ins. Co.*, 701 F. Supp. 177, 179 (S.D. Iowa 1988). One of the member teams of the NFL is the Minnesota Vikings, which has Minnesota citizenship. Thus, there is not complete diversity.

The Williamses urge this Court to exercise supplemental jurisdiction over their state-law claims. *See* 28 U.S.C. § 1367(c) (allowing but not requiring the Court to decline to exercise supplemental jurisdiction over a state law claim when it "has dismissed all claims over which it has original jurisdiction"). While the Court agrees with the Williamses that the case is not in a preliminary stage and that the exercise of jurisdiction is within the Court's discretion, it is also true that, with respect to the state-law claims, the issues are not fully developed and, at least in this Court's opinion, genuine issues of material fact remain

to be resolved. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988) ("When federal claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction . . . ."). Perhaps most important, however, is the fact that both DATWA and the CPA are statutes reflecting the public policy of the state of Minnesota. As such, it is more appropriate for a state court to make the sorts of decisions about the applicability of those statutes to the facts at hand. *See, e.g., Ankenbrandt v. Richards*, 504 U.S. 689, 705-706 (1992) (federal court may decline to hear a case when it "presents 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.'") (quoting *Colorado River Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)). The Court therefore declines to exercise supplemental jurisdiction over the Williamses' DATWA and CPA claims and will remand those claims to state court.

CONCLUSION

No genuine issues of material fact remain as to whether Defendants violated § 301 of the LMRA. Thus, the NFLPA's claims and the Williamses' common-law claims must be dismissed. The Court declines to exercise supplemental jurisdiction over the Williamses' state statutory claims.

Accordingly, **IT IS HEREBY ORDERED** that:

1. Defendants' Motion for Summary Judgment in Civ. No. 08-6254 (Docket No. 128) is **GRANTED**;

2. Defendants' Motion for Summary Judgment in Civ. No. 08-6255 (Docket No. 111) is **GRANTED in part** and **DENIED in part**;

3. Plaintiff's Motion for Summary Judgment in Civ. No. 08-6254 (Docket No. 123) is **DENIED**;

4. Plaintiffs' Motion for Summary Judgment in Civ. No. 08-6255 (Docket No. 105) is **DENIED**;

5. In Civ. No. 08-6255, Plaintiffs' common-law claims are **DISMISSED with prejudice**, and the remaining claims are **REMANDED** to Minnesota state court.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: May 22, 2009

s/Paul A. Magnuson
Paul A. Magnuson
United States District
Court Judge

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 09-2247/2462

Kevin Williams; Pat Williams,	*	
	*	
Plaintiffs - Appellees/	*	
Cross Appellants,	*	
	*	
v.	*	Appeals from
	*	the United
National Football League;	*	States District
John Lombardo, M.D.,	*	Court for the
	*	District of
Defendants - Appellants/	*	Minnesota.
Cross Appellees,	*	
	*	
Brian Finkle,	*	
	*	
Defendant,	*	
	*	
Adolpho Birch,	*	
	*	
Defendant - Appellant/	*	
Cross Appellee.	*	
	*	
	*	
National Basketball Association;	*	
National Hockey League;	*	

United States Anti-Doping Agency; *
Major League Baseball, *
*
Amici on behalf of *
Appellant. *

No. 09-2249

National Football League Players *
Association, *
*
Plaintiff - Appellant, *
*
v. *
*
National Football League; National *
Football League Management *
Counsel, *
*
Defendants - Appellees. *
*

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

LOKEN, Chief Judge, dissenting from denial of rehearing en banc.

I join Part II of Judge Colloton's dissent. In addition, I conclude that another aspect of the panel's decision warrants rehearing en banc.

The panel explains that the statutory claims under Minnesota's Drug and Alcohol Testing in the Workplace Act and Lawful Consumable Products Act were first asserted by Vikings players Kevin Williams and Pat Williams after the NFL removed their case to federal court. After dismissing the players' common law and federal claims, and the NFLPA's § 301 claim, the district court declined to exercise supplemental jurisdiction over these statutory claims, leaving the injunction against the NFL's suspension of the players in place while those claims are litigated in state court. In my view, this was an abuse of discretion that seriously jeopardizes important interests protected by the federal labor laws.

Even if § 301 complete preemption would not apply to removal of these Minnesota statutory claims to federal court, "when a defense to a state claim is based on the terms of a collective-bargaining agreement, the state court will have to interpret that agreement to decide whether the state claim survives." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398 (1987). The Minnesota statutes in question afford an employee remedies against his "employer." *See* MINN. STAT. §§ 181.938, 181.956. Thus, one defense to these claims is that the NFL is not an "employer" subject to the statutory duties and remedies. As the panel recognized, the question whether, for these purposes, the employer of Kevin Williams and Pat Williams is the NFL or the Minnesota Vikings is complex. A proper answer requires analysis of the Collective Bargaining Agreement between the NFL and the NFLPA, the NFL Constitution and Bylaws, and the Standard Player Contract between the players and the Vikings. *See Clarett v. NFL*, 369 F.3d 124, 127-28 (2d Cir. 2004);

Mackey v. NFL, 543 F.2d 606, 610-11 (8th Cir. 1976). Thus, the defense requires a sophisticated understanding of the collectively bargained relationships—the "law of the shop" as the Supreme Court has called it—not mere reference to the bare terms of the CBA.

The NFL as a joint venture of individual professional sports teams has collectively bargained a regime in which players bargain some terms and conditions of employ individually with their teams while other terms "are reserved to the NFL and the players union's selected representative to negotiate." *Clarett*, 369 F.3d at 139. Preserving this regime is important to the federal labor laws:

> Multiemployer bargaining itself is a well-established, important, pervasive method of collective bargaining, offering advantages to both management and labor. . . . The upshot is that the practice at issue here plays a significant role in a collective-bargaining process that itself constitutes an important part of the Nation's industrial relations system.

Brown v. Pro Football, Inc., 518 U.S. 231, 240 (1996).

Moreover, § 301 preemption is not the only issue of federal law lurking here. If the NFL is not properly considered the players' employer, the result will be a state law injunction against a non-employer that seriously undermines the collectively bargained competitive parity between NFL teams. This calls into play another facet of federal labor law preemption, "whether the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the [Nation Labor Relations] Act's processes." *Lodge 76, IAM v. Wisc. Em-*

ployment Relations Comm'n, 427 U.S. 132, 147-48 (1976) (quotation omitted).

In these circumstances, even if the district court and the panel correctly concluded that these Minnesota statutory claims are not completely preempted by § 301, it was an abuse of discretion to decline jurisdiction over these claims, which were first asserted in federal court and raise important questions of federal law. Accordingly, I respectfully dissent from the denial of rehearing en banc.

COLLOTON, Circuit Judge, with whom RILEY and GRUENDER, Circuit Judges, join, and with whom LOKEN, Chief Judge, joins as to Part II, dissenting from denial of rehearing en banc.

The appeal of the National Football League, Dr. John Lombardo, and Adolpho Birch (collectively, "the NFL") argues that Minnesota state-law claims asserted by Kevin Williams and Pat Williams of the Minnesota Vikings are preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. In holding that the claims are not preempted, the panel reasoned that the NFL's defenses to liability under Minnesota law must not be considered in determining whether the state-law claims are "substantially dependent upon analysis" of a collective bargaining agreement, *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985), and thus preempted by § 301. *Williams v. National Football League*, 582 F.3d 863, 879 n.13 (8th Cir. 2009). The panel observed that there is a "conflict in our precedent" regarding whether defenses to state-law claims should be considered in the preemption analysis, but concluded that it was "'free to choose which line of cases to follow,'" *id.* (quoting *Meyer v. Schnucks Mkts., Inc.*, 163 F.3d 1048, 1050

(8th Cir. 1998)), and elected to rule in this case that the employer's defenses are irrelevant.

I.

This circuit has a peculiar approach to conflicting prior panel opinions. The prior panel rule emphatically holds that "[o]ne panel of this Court is not at liberty to disregard a precedent handed down by another panel," *Drake v. Scott*, 812 F.2d 395, 400 (8th Cir. 1987), but if a second panel violates this rule and deviates from circuit precedent, then subsequent panels are free to follow suit, and to disregard the original circuit precedent in favor of the second decision. *See Williams*, 582 F.3d at 879 n.13. This notion is often attributed to a decision in which the panel actually recognized that the first decision properly controls, as it should have controlled the second and subsequent panels. *Kostelec v. State Farm Fire and Cas. Co.*, 64 F.3d 1220, 1228 n.8 (8th Cir. 1995); *see also T.L. ex rel. Ingram v. United States*, 443 F.3d 956, 960 (8th Cir. 2006) ("When we are confronted with conflicting circuit precedent, the better practice normally is to follow the earliest opinion, as it should have controlled the subsequent panels that created the conflict.") (citing *Kostelec*, 64 F.3d at 1228 n.8). Later decisions, however, have simply asserted authority to choose either precedent, without regard to sequence, *e.g.*, *Graham v. Contract Transp., Inc.*, 220 F.3d 910, 914 (8th Cir. 2000) (citing *Kostelec*, 64 F.3d at 1228 n.8), thus making this court an outlier among the circuits. *See McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (holding that "as to conflicts between panel opinions, application of the basic rule that one panel cannot overrule another requires a panel to follow the earlier of the conflicting opinions," and collecting au-

thority to demonstrate that "[m]ost of the other circuits agree").

If this court is going to follow such an unusual rule (a question that may deserve en banc treatment in and of itself), then the court should be more receptive to petitions for rehearing en banc that seek resolution of conflicting circuit precedents. A principal purpose of en banc review is "to secure and maintain uniformity of the court's decisions." Fed. R. App. P. 35(b)(1)(A). If future panels are "free to choose" each time among conflicting rules of law, articulated by different prior panels, then the law is not predictable. One case may hold that state-law defenses are irrelevant to preemption analysis under § 301; the next case may hold that defenses are dispositive; the third case may revert to the rule of irrelevance, and so on. Parties cannot know in advance what rule will govern their case; district courts may waste valuable time by picking the wrong side of an intra-circuit conflict. The conflict cited by the petition for rehearing in this case involves an important question of federal law that should be settled, one way or the other.

II.

This case also warrants further review because it appears, on the merits, that the panel has chosen to follow the wrong line of circuit precedent. As the petition for rehearing explains, our cases seem to have confused "ordinary preemption" with "complete preemption." The doctrine of complete preemption is a corollary to the "well-pleaded complaint" rule, both of which concern the proper forum—federal or state—in which a claim should be litigated. The well-pleaded complaint rule establishes that a case "may not be removed to federal court on the basis of a federal de-

fense . . . even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987) (emphasis omitted). The doctrine of complete preemption, however, provides that even a complaint that purports to plead only a state-law claim may be "completely preempted" by § 301, and thus removable to federal court, if *the claim pleaded by the plaintiff* is "founded directly on rights created by collective-bargaining agreements" or "substantially dependent on analysis of a collective-bargaining agreement." *Id.* at 394 (internal quotation omitted). With respect to an employer's defenses to state-law claims, the Supreme Court in *Caterpillar* explained that *complete preemption* and *removal to federal court* may not be premised on "the presence of a federal question, even a § 301 question, in a defensive argument." *Id.* at 398.

Ordinary preemption, by contrast, provides a substantive defense to a state law action on the basis of federal law, in whatever forum the case it is litigated. *See Firstcom, Inc. v. Qwest Corp.*, 555 F.3d 669, 677 & n.6 (8th Cir. 2009); *Trustees of the Twin City Bricklayers Fringe Benefit Funds v. Superior Waterproofing, Inc.*, 450 F.3d 324, 329 n.3 (8th Cir. 2006). The NFL in this case invoked an ordinary preemption defense, based on § 301, against state-law claims that the plaintiffs filed in federal court. There was no dispute about complete preemption or removal jurisdiction.

The *Williams* panel suggested that its decision was "more faithful to Supreme Court precedent," 582 F.3d at 879 n.13, but the *Caterpillar* decision on which it relied did not establish that an employer's defenses are irrelevant to whether a plaintiff's state-law claim

is defeated by principles of ordinary preemption. To the contrary, while the employer in *Caterpillar* argued that its defense to the plaintiffs' state-law claim required interpretation of a collective-bargaining agreement, such that § 301 preempted the claim, the Court *intimated no view* on the merits of that preemption argument, leaving it to be addressed in the first instance by the state court in which the plaintiffs filed their claims. 482 U.S. at 398 & n.13. Of course, if the employer's defense were irrelevant to ordinary preemption, as the *Williams* panel concluded, then there would have been no reason for the Court in *Caterpillar* to reserve judgment on the merits of the preemption defense. Similarly, in deciding whether a state-law retaliatory discharge claim was preempted by § 301 under principles of ordinary preemption, the Supreme Court in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), considered whether the employer's defense to the state-law claim turned on the meaning of a provision of a collective-bargaining agreement. *Id.* at 407. Again, if the employer's defenses were irrelevant to the ordinary preemption analysis, then there would have been no reason for the Court to consider them.

Our earliest cases concerning preemption and § 301 understood the Supreme Court to mean that defenses were relevant to ordinary preemption. *See Hanks v. General Motors Corp.*, 859 F.2d 67, 70 (8th Cir. 1988) ("*Lingle* makes plain . . . that the defenses, as well as claims, must be considered in determining whether resolution of the state law claims requires construing the collective bargaining agreement."); *see also Luecke v. Schnucks Mkts., Inc.*, 85 F.3d 356, 360 n.4 (8th Cir. 1996); *Johnson v. AnheuserBusch, Inc.*,

876 F.2d 620, 623 (8th Cir. 1989). The later decision in *Meyer*, 163 F.3d 1048, which concerned complete preemption and removal jurisdiction, *id.* at 1050, declared that our precedents on § 301 preemption were "conflicting," but correctly explained that defenses to a state-law claim did not create a basis for LMRA preemption in a case involving complete preemption and removal jurisdiction. *Id.* at 1051 (citing *Humphrey v. Sequentia, Inc.*, 58 F.3d 1238, 1244 (8th Cir. 1995)). A subsequent decision in *Bogan v. General Motors Corp.*, 500 F.3d 828 (8th Cir. 2007), however, interpreted *Meyer* to mean that an employer's defenses are irrelevant to *ordinary* preemption analysis, and elected to follow this dubious interpretation of *Meyer* rather than the earlier precedents of *Hanks* and *Johnson*. *Id.* at 833. *Williams* followed *Bogan*, deepening the intra-circuit conflict.

* * *

These inconsistent precedents, together with our cases allowing each future panel to follow the precedent that it prefers, leave the law of the circuit confused and uncertain on a significant issue of federal law. The procedural distinction between cases involving complete preemption and ordinary preemption, ably explained with reference to *Caterpillar* by the Seventh Circuit in *Smith v. Colgate-Palmolive Co.*, 943 F.2d 764, 769-71 (7th Cir. 1991), suggests that the *Williams* panel incorrectly declared the NFL's defenses to the state-law claims irrelevant to the question of ordinary preemption under § 301. For these reasons, I would grant the NFL's petition for rehearing en banc.

December 14, 2009

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

NATIONAL FOOTBALL LEAGUE

Jeffrey Pash
Executive Vice President

December 2, 2008

Peter Ginsberg, Esq.
Crowell & Moring LLP
153 East 53d Street
31st Floor
New York, NY 10022

Re: Appeals of Messrs. Kevin and Pat Williams

Dear Mr. Ginsberg:

This will set forth my decision in the appeals of Kevin Williams and Pat Williams, each of whom is alleged to have violated the NFL's Policy and Procedure on Anabolic Steroids and Related Substances. Specifically, urine specimens provided by both players on or about July 26, 2008 tested positive for bumetanide, a diuretic specifically banned under the Policy. Each player's "B" bottle was subsequently tested and was similarly found to be positive for bumetanide. The players were advised by letter of September 26, 2008 (Mr. Kevin Williams) and October 3, 2008 (Mr. Pat Williams) that this positive test was a violation of the Steroids Policy and that a suspension without pay of four games was being imposed for the violation. Each player noticed a timely appeal and their appeals were

consolidated. A hearing was held on November 20, 2008. (Appeal Book, Tabs B-H (K. Williams); Tabs B-E (P. Williams).)

The essential facts underlying the appeals are as follows:

1. There is no genuine dispute regarding the positive test of each player's urine specimen. On appeal, none of the players challenged the laboratory analysis, the chain-of-custody, or any other aspect of the test. One witness, Mr. Crouch, challenged the sufficiency of the laboratory package on the grounds that it did not strictly conform to the guidelines of the World Anti-Doping Agency ("WADA") (Ex. P), but there was no suggestion that the laboratory package did not conform to the requirements of the Policy (*see* 2008 Steroid Policy at Appendix I). The testimony of Drs. Black, Finkle and Lombardo is sufficient to establish the validity and reliability of the test results.

2. The test did not disclose the presence of any anabolic steroid or related performance-enhancing substance. For purposes of this appeal, I accept the representations of both players that they did not use steroids. Nor were any of the urine specimens found to be dilute. (Appeal Book, Tab L (K. Williams); Tab H (P. Williams).)

3. Bumetanide, a potent diuretic, has long been a Prohibited Substance under the Policy; as Dr. Black explained, it is a prohibited substance in many other programs as well. Diuretics are banned for two reasons—first, because they can mask the use of performance enhancing drugs; and second, because they can lead to dehydration, and therefore pose a threat to player health and safety. Drs.

Black and Lombardo so testified. Dr. Black also testified that in certain contexts, diuretics can be performance enhancing.

4. Each player testified that he used a dietary supplement called "StarCaps," which has been found to contain bumetanide. This substance is not disclosed on the label of StarCaps or other information about the product. (*See, e.g.*, Ex. C.) Each player said he used StarCaps to help with weight control or reduction, and that on more than one occasion, he took StarCaps the night before a scheduled weigh-in.

5. The Policy has long contained explicit warnings relating to dietary supplements. Section 3E of the Policy reads as follows:

> **"E. Unknowing Administration of Prohibited Substances**
>
> Players are responsible for what is in their bodies, and a positive test result will not be excused because a player was unaware that he was taking a Prohibited Substance. If you have questions or concerns about a particular dietary supplement or other product, you should contact Dr. John Lombardo at (614) 442-0106. As the Independent Administrator, Dr. Lombardo is authorized to respond to players' questions regarding specific supplements. You may also contact the NFL/
> NFLPA Supplement Hotline at (866) NFL-SUPP or NFLSupp@DrugFreeSport.com. **Having your Club's medical or training staff approve a supplement will not excuse a positive test result."**

Neither player called Dr. Lombardo to discuss StarCaps or any other supplement. This is significant because, as quoted above, the Policy specifically advises players that if they "have questions or concerns about a particular dietary supplement or other product, [they] should contact Dr. John Lombardo. . . ." Nor did either player tell his team physician or trainer that he was using StarCaps.

A further warning about supplements is contained in Section 8 of the Policy, which reads as follows:

> **"Masking Agents and Supplements**
>
> The use of so-called 'blocking' or 'masking' agents is prohibited by this Policy. These include diuretics or water pills, which have been used in the past by some players to reach an assigned weight.
>
> In addition, a positive test will not be excused because it results from the use of a dietary supplement, rather than from the intentional use of a Prohibited Substance. Players are responsible for what is in their bodies. For more information concerning dietary supplements, *see* Appendix F."

6. Appendix A to the Policy identifies as one prohibited "Doping Method" the "(i)ntroduction of a Prohibited Substance into the body by any means, including but not limited to . . . the ingestion . . . of a supplement or other product containing a Prohibited Substance."

7. Appendix F to the Policy, entitled "Use of Supplements," is a letter jointly signed by Harold Hender-

son of the NFL and the late Gene Upshaw of the NFLPA. That letter reads as follows:

> "Over the past several years, we have made a special effort to educate and warn players about the risks involved in the use of 'nutritional supplements.' Despite these efforts, several players have been suspended even though their positive test result may have been due to the use of a supplement. Subject to your right of appeal, **if you test positive or otherwise violate the Policy, you *will* be suspended**. You and you alone are responsible for what goes into your body. Claiming that you used only legally available nutritional supplements will not help you in an appeal.
>
> As the Policy clearly warns, supplements are not regulated or monitored by the government. This means that, even if they are bought over-the-counter from a known establishment, there is currently no way to be sure that they:
>
> (a) contain the ingredients listed on the packaging;
>
> (b) have not been tainted with prohibited substances; or
>
> (c) have the properties or effects claimed by the manufacturer or salesperson.
>
> Therefore, if you take these products, you do so AT YOUR OWN RISK! For your own health and success in the League, we strongly encourage you to avoid the use of

supplements altogether, or at the very least to be extremely careful about what you choose to take."

8. The next page of the Policy (Appendix G) is a memo to all players from Dr. John Lombardo, the Independent Administrator of the Policy, in which he reiterates the warnings from Messrs. Henderson and Upshaw, and emphasizes the lack of government regulation of supplements. Dr. Lombardo's memo states, "[i]f you take supplements that contain a substance that violates the policy it will subject you to discipline. More importantly, you run the risk of harmful health effects associated with their use."

9. NFL players also received separate advisories regarding supplements. These memos were generally sent through the trainers for distribution to players and are sometimes posted in locker rooms or elsewhere in a club facility. Those advisories included a separate copy of the letter from Messrs. Henderson and Upshaw (signed by each of them) which appears as Appendix F of the Policy; as well as their letter announcing the new "Dietary Supplement Hotline;" a memo entitled "Play It Safe!;" and two memos from Dr. Lombardo entitled "Weight Reduction Products," which were sent to players in July, 2007, and again in July, 2008.

   The letter from Messrs. Henderson and Upshaw regarding the supplement hotline states that players must "remember—*You and you alone are still responsible for what goes into your body*. Using the Hotline will <u>not</u> excuse a positive test result."

   The memo entitled "Play It Safe!" reminds players that "some seemingly harmless dietary supple-

ments can cause you to test positive for a banned substance."

The memos on Weight Reduction Products remind players that these products "predominately contain stimulants for increasing metabolism and suppressing appetite and/or diuretics or water pills for water weight loss;" that "the contents of supplements may not match what is listed on the label of the bottle" and that "(i)f you test positive for a banned stimulant or diuretic or water pill, this constitutes a positive test." It also gives contact information so that players may contact Dr. Lombardo by phone or email with questions. Dr. Lombardo testified that one reason for preparing these memos was his concern that StarCaps contained a diuretic, but that his concern was not limited to StarCaps. Rather, he believed a broader warning about weight reduction supplements was appropriate. He described certain types of supplements, including weight loss supplements, as "high-risk."

Apart from the Policy itself and other written material, Dr. Lombardo testified that every presentation to teams and players includes warnings about the dangers and risks inherent in the use of supplements.

10. Each player testified that he was aware of the warnings regarding supplements, of the Hotline, and of the rule that each player is responsible for what is in his body. Each player testified that he had been briefed on the Policy each year, had received a copy of the Policy each year at training camp, and had seen at least some of the separate advisories sent by Dr. Lombardo. The Head Ath-

letic Trainer, Mr. Sugarman, testified that he advises players not to use diuretics, and that it is his regular practice to put memos or other advisories into the locker of each player. For example, he testified that he followed this practice when he received Dr. Lombardo's memo on weight reduction products earlier this year.

11. The record establishes that Dr. Lombardo became concerned approximately two years ago that players using Star Caps had tested positive for diuretics. He discussed the matter with Dr. Finkle, and the laboratory at the Center for Human Toxicology at the University of Utah was asked to determine whether StarCaps in fact contained a diuretic, even though no such substance was identified on the label of the product or on the website where StarCaps were sold. The lab purchased a bottle of StarCaps and found that test subjects who used Star Caps tested positive for bumetanide. The findings were subsequently published in the November/December 2007 issue of the *Journal of Analytical Toxicology*. (Ex. F.)

12. As a result of the positive tests, two notifications specifically mentioning StarCaps were sent on December 19, 2006. One was sent to the Presidents, General Managers and Head Athletic Trainers of all NFL clubs. The second (Ex. 6) was sent to Stacy Robinson, the NFLPA executive who oversees the Steroid Policy on behalf of the Union. The letter to Mr. Robinson states that, "Balanced Health Products, which distributes StarCaps has been added to the list of prohibited dietary supplement companies. Please distribute this information to the agents and players through your normal channels."

In response, Mr. Robinson added Balanced Health Products to the list of banned companies that is maintained on the NFLPA's website.

13. No specific advisory or other communication regarding the presence of bumetanide in StarCaps was sent to NFL players.

14. Each player had a "weight clause" in his contract that provided for a bonus of up to $400,000 if he was at his prescribed weight 11 dates (eight during the season and three during the off-season) The weight clause provided that the player had to make weight safely and would not engage in any "last minute weight reduction techniques," which included "use of diuretics." (Ex. 4.) Notwithstanding that commitment, each player used StarCaps to reduce his weight, which allowed him to earn his bonus. Mr. Warren testified that the weight clause in Kevin Williams' contract was also for "performance reasons."

15. The WADA has recently adopted amendments to its Anti-Doping Code providing that an athlete may seek to demonstrate that a banned substance was used inadvertently and intending to enhance performance. If the athlete is able to do so, the amendment to the WADA Code would permit the sanction to be dramatically reduced, perhaps to as little as a reprimand. (Ex. N.) The current minimum sanction under the WADA Code for a violation of this type would be a one-year suspension. Because the amendments to the WADA Code have not taken effect, no cases have yet been resolved under the amended Code and how it will apply in actual cases is therefore unknown. It bears emphasis, however, that these appeals are not governed

by the WADA Code and instead must be decided based on the collectively-bargained Policy.

There is no question that the Policy embodies a collectively-bargained rule of strict liability—a rule that players alone are responsible for what is in their bodies; that inadvertent or unknowing use of a prohibited substance will not excuse a positive test; and that supplements are used at the player's own risk. Similarly, there is no question that at the time that he used StarCaps as well as at the time of the hearing, each player clearly understood that rule and what it means.

Notwithstanding the rule of strict liability, each player contends that his violation should be excused because the NFL and Dr. Lombardo were aware that StarCaps contained an undisclosed banned substance, bumetanide, but did not specifically advise NFL players of this fact. The players do not contend that the NFL, NFLPA or Dr. Lombardo is obligated to test supplements for banned substances and inform players of the result of those tests. But where, as here, the testing process leads to specific information about a specific product, the players argue that the league and Dr. Lombardo have a duty to inform NFL players of the specific threat of the specific product. The players argue that the warnings about supplements in general, or weight reduction products in particular, are insufficient to fulfill this asserted obligation. Simply put, even though neither player contacted Dr. Lombardo about StarCaps (as the Policy directs them to do), they contend that where specific evidence is available about a particular product, a specific warning is required, and that the failure to extend such a warning should excuse any violation of the Policy as-

sociated with that product.

This position flies in the face of nearly two decades of history. The rule of strict liability is a fundamental principle that underlies the Policy. As recently as October 1, 2008, Mr. Robinson sent a memo to agents emphasizing the strict liability principle. The memo advised agents that "*many* players may be unknowingly violating the NFL Policy for Anabolic Steroids and Related Substances . . . most likely due to weight reduction products. . . . Often, these products contain diuretics (fluid reducers), **which are banned by the NFL [Steroids] Policy. . . .** The memo goes on to state that, "**ALL** positive tests for banned substances, including diuretics or water pills, directly violate the Policy and are subject to discipline." The agents were asked to "pass this important information on to all players." (Ex. MC-8.)

The rule puts the burden on players to be responsible and accountable for what is in their bodies. It avoids complex issues of intent and ensures that all players will be treated equally under the Policy. It establishes a simple and straightforward—if admittedly inflexible—rule to guide player conduct and administration of the Policy. Based on this record, there is no question that each of these players have heard and understood those warnings and know that they are responsible for what is in their bodies.

Players are repeatedly warned that if they take supplements, they do so at their own risk in terms of both their playing status and their health. Both the Policy and Dr. Lombardo's memoranda identify particular risks associated with diuretics, "water pills," and weight loss supplements. Each player acknowledged that he clearly understood these risks. Neither

player discussed the use of StarCaps with his trainer or called Dr. Lombardo or the Hotline. (There was considerable testimony to the effect that the Hotline is frustrating ("a joke" in Mr. Warren's words), in part because it will not affirmatively approve a supplement. The testimony was that the Hotline always reminds players that the supplement may contain a banned substance and that the player is responsible for what is in his body. This is part of the effort to ensure that players understand the risks inherent in taking supplements and do not believe that they are safe or reliable.) The players used StarCaps at their own risk, did so in the face of repeated warnings about the risks inherent in using supplements in general and weight loss products in particular, and did so knowing that a positive test would result in suspension and would not be excused based on a claim of unintentional or inadvertent use.

The Policy does not articulate or impose an obligation to issue specific warnings about specific products, and nothing in the record suggests that the bargaining parties have ever contemplated imposing such a requirement on Dr. Lombardo. Instead, the parties agreed to vest Dr. Lombardo, as the Independent Administrator, with the discretion to "oversee the development of educational materials" on steroids. In discharging that responsibility, Dr. Lombardo, along with the bargaining parties, has repeatedly emphasized the need for extreme caution in the use of any supplement, including weight reduction products. In response to the initial positive tests linked to StarCaps, Dr. Lombardo distributed a memorandum that went beyond the general warnings about supplements and specifically addressed weight reduction supple-

ments. He explained that he felt it inadvisable to single out one product, StarCaps, to the possible exclusion of other weight reduction supplements.

As Dr. Lombardo testified, the health and safety risks of weight reduction supplements are not limited to StarCaps. Those risks may result from diuretics, stimulants, or other substances found in weight loss supplements. Player use of supplements is not limited to StarCaps and Dr. Lombardo's warnings applied to a broad class of weight loss supplements, including StarCaps. Adherence to the normal rule of strict liability discourages use of potentially dangerous products and thereby protects players from the risks inherent in the use of supplements; a departure from that rule here would undermine one of the fundamental objectives of the Policy.

While Dr. Lombardo is now criticized by the players for not issuing a more specific warning, his judgment about what kind of warning to send to players was based on long experience, and his belief that the dangers of weight reduction supplements went beyond simply StarCaps. Certainly, there is no credible contention that he was in any way trying to trap unwary players.

In evaluating this contention, Dr. Black's testimony is important. His firm, Aegis Analytical Laboratories, provides testing and analytical services to a number of organizations, including NASCAR, IRL, and more than 80 Division I schools. He testified to the importance of providing information about supplements, including StarCaps. He has done so in response to calls from athletes and in discussions with athletic trainers; as he put it, the warnings occurred in conversations, or in calls from athletes. He has not

issued any formal written advisory. Nor is he aware of the U.S. Anti-Doping Agency having done so. Indeed, his understanding is that USADA does not give warnings about specific dietary supplements.

In this respect, the absence of a specific notice regarding StarCaps is not only consistent with the Policy, it reflects the practice of other leaders in the field. And just as Dr. Black responds to calls from athletes, so too would Dr. Lombardo. Thus, apart from the information already available to players regarding supplements, the bargaining parties have made the Independent Administrator available to answer questions about particular supplements, established a Hotline for players to call for information regarding supplements, created a Supplement Certification program with EAS to provide players with supplements that are free of banned substances, and repeatedly warned players about the dangers of unregulated and inaccurately-labeled dietary supplements.

It may be that a different approach to supplements in general or diuretics in particular could be appropriate, or that more, different, or more specific advisories would be helpful to players. The bargaining parties are free to negotiate changes in the Policy, including, if they deem it advisable, changes to the strict liability policy. But that is not the question here.

Based on both the language of the Policy, and its application over a nearly 20-year period, I find that the rule of strict liability applies here and that the suspensions should be upheld, just as suspensions have been consistently upheld in the past in cases involving use of dietary supplements that contained a banned substance. This is not intended to diminish what these players have accomplished during their

careers, or the contributions they have made to their teams and their community, or their prospects for future success in the NFL.

Sincerely,

Jeffrey Pash

cc: Kevin Williams
Pat Williams
Kevin Warren, Esq.
Adolpho Birch, Esq.
Richard Berthelsen, Esq.
Stacy Robinson

Title 29. Labor

Chapter 7. Labor-Management Relations

Subchapter IV. Liabilities of and Restrictions on Labor and Management

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Chapter 181. Employment

Drug and Alcohol Testing in the Workplace

§ 181.950. Definitions

Subdivision 1. Applicability.

For the purposes of sections 181.950 to 181.957, the terms and phrases defined in this section have the meanings given them.

Subd. 2. Confirmatory test; confirmatory retest.

"Confirmatory test" and "confirmatory retest" mean a drug or alcohol test that uses a method of analysis allowed under one of the programs listed in section 181.953, subdivision 1.

Subd. 3.

[Repealed]

Subd. 4. Drug.

"Drug" means a controlled substance as defined in section 152.01, subdivision 4.

Subd. 5. Drug and alcohol testing.

"Drug and alcohol testing," "drug or alcohol testing," and "drug or alcohol test" mean analysis of a body component sample according to the standards established under one of the programs listed in section 181.953, subdivision 1, for the purpose of measuring the presence or absence of drugs, alcohol, or their metabolites in the sample tested.

Subd. 6. Employee.

"Employee" means a person, independent contractor, or person working for an independent contractor who performs services for compensation, in whatever form, for an employer.

Subd. 7. Employer.

"Employer" means a person or entity located or doing business in this state and having one or more employees, and includes the state and all political or other governmental subdivisions of the state.

Subd. 8. Initial screening test.

"Initial screening test" means a drug or alcohol test which uses a method of analysis under one of the programs listed in section 181.953, subdivision 1.

Subd. 9. Job applicant.

"Job applicant" means a person, independent contractor, or person working for an independent contractor who applies to become an employee of an employer, and includes a person who has received a job offer made contingent on the person passing drug or alcohol testing.

Subd. 10. Positive test result.

"Positive test result" means a finding of the presence of drugs, alcohol, or their metabolites in the sample tested in levels at or above the threshold detection levels contained in the standards of one of the programs listed in section 181.953, subdivision 1.

Subd. 11. Random selection basis.

"Random selection basis" means a mechanism for selection of employees that (1) results in an equal probability that any employee from a group of employees subject to the selection mechanism will be selected and (2) does not give an employer discretion to waive the selection of any employee selected under the mechanism.

Subd. 12. Reasonable suspicion.

"Reasonable suspicion" means a basis for forming a belief based on specific facts and rational inferences drawn from those facts.

Subd. 13. Safety-sensitive position.

"Safety-sensitive position" means a job, including any supervisory or management position, in which an impairment caused by drug or alcohol usage would threaten the health or safety of any person.

Chapter 181. Employment

Drug and Alcohol Testing in the Workplace

§ 181.951. Authorized Drug and Alcohol Testing

Subdivision 1. Limitations on testing.

(a) An employer may not request or require an employee or job applicant to undergo drug and alcohol testing except as authorized in this section.

(b) An employer may not request or require an employee or job applicant to undergo drug or alcohol testing unless the testing is done pursuant to a written drug and alcohol testing policy that contains the minimum information required in section 181.952; and, is conducted by a testing laboratory which participates in one of the programs listed in section 181.953, subdivision 1.

(c) An employer may not request or require an employee or job applicant to undergo drug and alcohol testing on an arbitrary and capricious basis.

Subd. 2. Job applicant testing.

An employer may request or require a job applicant to undergo drug and alcohol testing provided a job offer has been made to the applicant and the same test is requested or required of all job applicants conditionally offered employment for that position. If the job offer is withdrawn, as provided in section 181.953, subdiv ision 11, the employer shall inform the job applicant of the reason for its action.

Subd. 3. Routine physical examination testing.

An employer may request or require an employee to undergo drug and alcohol testing as part of a routine physical examination provided the drug or alcohol test is requested or required no more than once annually and the employee has been given at least two weeks' written notice that a drug or alcohol test may be requested or required as part of the physical examination.

Subd. 4. Random testing.

An employer may request or require employees to undergo drug and alcohol testing on a random selection basis only if (1) they are employed in safety-sensitive positions, or (2) they are employed as professional athletes if the professional athlete is subject to a collective bargaining agreement permitting random testing but only to the extent consistent with the collective bargaining agreement.

Subd. 5. Reasonable suspicion testing.

An employer may request or require an employee to undergo drug and alcohol testing if the employer has a reasonable suspicion that the employee:

(1) is under the influence of drugs or alcohol;

(2) has violated the employer's written work rules prohibiting the use, possession, sale, or transfer of drugs or alcohol while the employee is working or while the employee is on the employer's premises or operating the employer's vehicle, machinery, or equipment, provided the work rules are in writing and contained in

the employer's written drug and alcohol testing policy;

(3) has sustained a personal injury, as that term is defined in section 176.011, subdivision 16, or has caused another employee to sustain a personal injury; or

(4) has caused a work-related accident or was operating or helping to operate machinery, equipment, or vehicles involved in a work-related accident.

Subd. 6. Treatment program testing.

An employer may request or require an employee to undergo drug and alcohol testing if the employee has been referred by the employer for chemical dependency treatment or evaluation or is participating in a chemical dependency treatment program under an employee benefit plan, in which case the employee may be requested or required to undergo drug or alcohol testing without prior notice during the evaluation or treatment period and for a period of up to two years following completion of any prescribed chemical dependency treatment program.

Subd. 7. No legal duty to test.

Employers do not have a legal duty to request or require an employee or job applicant to undergo drug or alcohol testing as authorized in this section.

Chapter 181. Employment

Drug and Alcohol Testing in the Workplace

§ 181.952. Policy Contents; Prior Written Notice

Subdivision 1. Contents of the policy.

An employer's drug and alcohol testing policy must, at a minimum, set forth the following information:

(1) the employees or job applicants subject to testing under the policy;

(2) the circumstances under which drug or alcohol testing may be requested or required;

(3) the right of an employee or job applicant to refuse to undergo drug and alcohol testing and the consequences of refusal;

(4) any disciplinary or other adverse personnel action that may be taken based on a confirmatory test verifying a positive test result on an initial screening test;

(5) the right of an employee or job applicant to explain a positive test result on a confirmatory test or request and pay for a confirmatory retest; and

(6) any other appeal procedures available.

Subd. 2. Notice.

An employer shall provide written notice of its drug and alcohol testing policy to all affected employees upon adoption of the policy, to a previously nonaffected employee upon transfer to an affected position

under the policy, and to a job applicant upon hire and before any testing of the applicant if the job offer is made contingent on the applicant passing drug and alcohol testing. An employer shall also post notice in an appropriate and conspicuous location on the employer's premises that the employer has adopted a drug and alcohol testing policy and that copies of the policy are available for inspection during regular business hours by its employees or job applicants in the employer's personnel office or other suitable locations.

Chapter 181. Employment

Drug and Alcohol Testing in the Workplace

§ 181.953. Reliability and Fairness Safeguards

Subdivision 1. Use of licensed, accredited, or certified laboratory required.

(a) An employer who requests or requires an employee or job applicant to undergo drug or alcohol testing shall use the services of a testing laboratory that meets one of the following criteria for drug testing:

(1) is certified by the National Institute on Drug Abuse as meeting the mandatory guidelines published at 53 Federal Register 11970 to 11989, April 11, 1988;

(2) is accredited by the College of American Pathologists, 325 Waukegan Road, Northfield, Illinois, 60093-2750, under the forensic urine drug testing laboratory program; or

(3) is licensed to test for drugs by the state of New York, Department of Health, under Public Health Law, article 5, title V, and rules adopted under that law.

(b) For alcohol testing, the laboratory must either be:

(1) licensed to test for drugs and alcohol by the state of New York, Department of Health, under Public Health Law, article 5, title V, and the rules adopted under that law; or

(2) accredited by the College of American Pathologists,

325 Waukegan Road, Northfield, Illinois, 60093-2750, in the laboratory accreditation program.

Subd. 2.

[Repealed]

Subd. 3. Laboratory testing, reporting, and sample retention requirements.

A testing laboratory that is not certified by the National Institute on Drug Abuse according to subdivision 1 shall follow the chain-of-custody procedures prescribed for employers in subdivision 5. A testing laboratory shall conduct a confirmatory test on all samples that produced a positive test result on an initial screening test. A laboratory shall disclose to the employer a written test result report for each sample tested within three working days after a negative test result on an initial screening test or, when the initial screening test produced a positive test result, within three working days after a confirmatory test. A test report must indicate the drugs, alcohol, or drug or alcohol metabolites tested for and whether the test produced negative or positive test results. A laboratory shall retain and properly store for at least six months all samples that produced a positive test result.

Subd. 4. Prohibitions on employers.

An employer may not conduct drug or alcohol testing of its own employees and job applicants using a testing laboratory owned and operated by the employer; except that, one agency of the state may test the employees of another agency of the state. Except as provided in subdivision 9, an employer may not request

or require an employee or job applicant to contribute to, or pay the cost of, drug or alcohol testing under sections 181.950 to 181.954.

Subd. 5. Employer chain-of-custody procedures.

An employer shall establish its own reliable chain-of-custody procedures to ensure proper record keeping, handling, labeling, and identification of the samples to be tested. The procedures must require the following:

(1) possession of a sample must be traceable to the employee from whom the sample is collected, from the time the sample is collected through the time the sample is delivered to the laboratory;

(2) the sample must always be in the possession of, must always be in view of, or must be placed in a secured area by a person authorized to handle the sample;

(3) a sample must be accompanied by a written chain-of-custody record; and

(4) individuals relinquishing or accepting possession of the sample must record the time the possession of the sample was transferred and must sign and date the chain-of-custody record at the time of transfer.

Subd. 6. Rights of employees and job applicants.

(a) Before requesting an employee or job applicant to undergo drug or alcohol testing, an employer shall provide the employee or job applicant with a form, developed by the employer, on which to acknowledge that the employee or job applicant has seen the em-

ployer's drug and alcohol testing policy.

(b) If an employee or job applicant tests positive for drug use, the employee must be given written notice of the right to explain the positive test and the employer may request that the employee or job applicant indicate any over-the-counter or prescription medication that the individual is currently taking or has recently taken and any other information relevant to the reliability of, or explanation for, a positive test result.

(c) Within three working days after notice of a positive test result on a confirmatory test, the employee or job applicant may submit information to the employer, in addition to any information already submitted under paragraph (b), to explain that result, or may request a confirmatory retest of the original sample at the employee's or job applicant's own expense as provided under subdivision 9.

Subd. 7. Notice of test results.

Within three working days after receipt of a test result report from the testing laboratory, an employer shall inform in writing an employee or job applicant who has undergone drug or alcohol testing of (1) a negative test result on an initial screening test or of a negative or positive test result on a confirmatory test and (2) the right provided in subdivision 8. In the case of a positive test result on a confirmatory test, the employer shall also, at the time of this notice, inform the employee or job applicant in writing of the rights provided in subdivisions 6, paragraph (b), 9, and either subdivision 10 or 11, whichever applies.

Subd. 8. Right to test result report.

An employee or job applicant has the right to request and receive from the employer a copy of the test result report on any drug or alcohol test.

Subd. 9. Confirmatory retests.

An employee or job applicant may request a confirmatory retest of the original sample at the employee's or job applicant's own expense after notice of a positive test result on a confirmatory test. Within five working days after notice of the confirmatory test result, the employee or job applicant shall notify the employer in writing of the employee's or job applicant's intention to obtain a confirmatory retest. Within three working days after receipt of the notice, the employer shall notify the original testing laboratory that the employee or job applicant has requested the laboratory to conduct the confirmatory retest or transfer the sample to another laboratory licensed under subdivision 1 to conduct the confirmatory retest. The original testing laboratory shall ensure that the chain-of-custody procedures in subdivision 3 are followed during transfer of the sample to the other laboratory. The confirmatory retest must use the same drug or alcohol threshold detection levels as used in the original confirmatory test. If the confirmatory retest does not confirm the original positive test result, no adverse personnel action based on the original confirmatory test may be taken against the employee or job applicant.

Subd. 10. Limitations on employee discharge, discipline, or discrimination.

(a) An employer may not discharge, discipline, discriminate against, or request or require rehabilitation

of an employee on the basis of a positive test result from an initial screening test that has not been verified by a confirmatory test.

(b) In addition to the limitation under paragraph (a), an employer may not discharge an employee for whom a positive test result on a confirmatory test was the first such result for the employee on a drug or alcohol test requested by the employer unless the following conditions have been met:

(1) the employer has first given the employee an opportunity to participate in, at the employee's own expense or pursuant to coverage under an employee benefit plan, either a drug or alcohol counseling or rehabilitation program, whichever is more appropriate, as determined by the employer after consultation with a certified chemical use counselor or a physician trained in the diagnosis and treatment of chemical dependency; and

(2) the employee has either refused to participate in the counseling or rehabilitation program or has failed to successfully complete the program, as evidenced by withdrawal from the program before its completion or by a positive test result on a confirmatory test after completion of the program.

(c) Notwithstanding paragraph (a), an employer may temporarily suspend the tested employee or transfer that employee to another position at the same rate of pay pending the outcome of the confirmatory test and, if requested, the confirmatory retest, provided the employer believes that it is reasonably necessary to protect the health or safety of the employee, coemployees,

or the public. An employee who has been suspended without pay must be reinstated with back pay if the outcome of the confirmatory test or requested confirmatory retest is negative.

(d) An employer may not discharge, discipline, discriminate against, or request or require rehabilitation of an employee on the basis of medical history information revealed to the employer pursuant to subdivision 6 unless the employee was under an affirmative duty to provide the information before, upon, or after hire.

(e) An employee must be given access to information in the employee's personnel file relating to positive test result reports and other information acquired in the drug and alcohol testing process and conclusions drawn from and actions taken based on the reports or other acquired information.

Subd. 11. Limitation on withdrawal of job offer.

If a job applicant has received a job offer made contingent on the applicant passing drug and alcohol testing, the employer may not withdraw the offer based on a positive test result from an initial screening test that has not been verified by a confirmatory test.

Chapter 181. Employment

Drug and Alcohol Testing in the Workplace

§ 181.954. Privacy, Confidentiality, and Privilege Safeguards

Subdivision 1. Privacy limitations.

A laboratory may only disclose to the employer test result data regarding the presence or absence of drugs, alcohol, or their metabolites in a sample tested.

Subd. 2. Confidentiality limitations.

Test result reports and other information acquired in the drug or alcohol testing process are, with respect to private sector employees and job applicants, private and confidential information, and, with respect to public sector employees and job applicants, private data on individuals as that phrase is defined in chapter 13, and may not be disclosed by an employer or laboratory to another employer or to a third-party individual, governmental agency, or private organization without the written consent of the employee or job applicant tested.

Subd. 3. Exceptions to privacy and confidentiality disclosure limitations.

Notwithstanding subdivisions 1 and 2, evidence of a positive test result on a confirmatory test may be: (1) used in an arbitration proceeding pursuant to a collective bargaining agreement, an administrative hearing under chapter 43A or other applicable state or local law, or a judicial proceeding, provided that informa-

tion is relevant to the hearing or proceeding; (2) disclosed to any federal agency or other unit of the United States government as required under federal law, regulation, or order, or in accordance with compliance requirements of a federal government contract; and (3) disclosed to a substance abuse treatment facility for the purpose of evaluation or treatment of the employee.

Subd. 4. Privilege.

Positive test results from an employer drug or alcohol testing program may not be used as evidence in a criminal action against the employee or job applicant tested.

Chapter 181. Employment

Drug and Alcohol Testing in the Workplace

§ 181.955. Construction

Subdivision 1. Freedom to collectively bargain.

Sections 181.950 to 181.954 shall not be construed to limit the parties to a collective bargaining agreement from bargaining and agreeing with respect to a drug and alcohol testing policy that meets or exceeds, and does not otherwise conflict with, the minimum standards and requirements for employee protection provided in those sections.

Subd. 2. Employee protections under existing collective bargaining agreements.

Sections 181.950 to 181.954 shall not be construed to interfere with or diminish any employee protections relating to drug and alcohol testing already provided under collective bargaining agreements in effect on the effective date of those sections that exceed the minimum standards and requirements for employee protection provided in those sections.

Chapter 181. Employment

Drug and Alcohol Testing in the Workplace

§ 181.956. Remedies

Subdivision 1. Exhaustion.

An employee or collective bargaining agent may bring an action under this section only after first exhausting all applicable grievance procedures and arbitration proceeding requirements under a collective bargaining agreement; provided that, an employee's right to bring an action under this section is not affected by a decision of a collective bargaining agent not to pursue a grievance.

Subd. 2. Damages.

In addition to any other remedies provided by law, an employer or laboratory that violates sections 181.950 to 181.954 is liable to an employee or job applicant injured by the violation in a civil action for any damages allowable at law. If a violation is found and damages awarded, the court may also award reasonable attorney fees for a cause of action based on a violation of sections 181.950 to 181.954 if the court finds that the employer knowingly or recklessly violated sections 181.950 to 181.954.

Subd. 3. Injunctive relief.

An employee or job applicant, a state, county, or city attorney, or a collective bargaining agent who fairly and adequately represents the interests of the protected class has standing to bring an action for injunc-

tive relief requesting the district court to enjoin an employer or laboratory that commits or proposes to commit an act in violation of sections 181.950 to 181.954.

Subd. 4. Other equitable relief.

Upon finding a violation of sections 181.950 to 181.954, or as part of injunctive relief granted under subdivision 3, a court may, in its discretion, grant any other equitable relief it considers appropriate, including ordering the injured employee or job applicant reinstated with back pay.

Subd. 5. Retaliation prohibited.

An employer may not retaliate against an employee for asserting rights and remedies provided in sections 181.950 to 181.954.

Chapter 181. Employment

Drug and Alcohol Testing in the Workplace

§ 181.957. Federal Preemption

Subdivision 1. Excluded employees and job applicants.

Except as provided under subdivision 2, the employee and job applicant protections provided under sections 181.950 to 181.956 do not apply to employees and job applicants where the specific work performed requires those employees and job applicants to be subject to drug and alcohol testing pursuant to:

(1) federal regulations that specifically preempt state regulation of drug and alcohol testing with respect to those employees and job applicants;

(2) federal regulations or requirements necessary to operate federally regulated facilities;

(3) federal contracts where the drug and alcohol testing is conducted for security, safety, or protection of sensitive or proprietary data; or

(4) state agency rules that adopt federal regulations applicable to the interstate component of a federally regulated industry, and the adoption of those rules is for the purpose of conforming the nonfederally regulated intrastate component of the industry to identical regulation.

Subd. 2. Exclusion limited.

Employers and testing laboratories must comply with

the employee and job applicant protections provided under sections 181.950 to 181.956, with respect to employees or job applicants otherwise excluded under subdivision 1 from those protections, to the extent that the provisions of sections 181.950 to 181.956 are not inconsistent with or specifically preempted by the federal regulations, contract, or requirements applicable to drug and alcohol testing.

NATIONAL FOOTBALL LEAGUE

POLICY ON ANABOLIC STEROIDS AND RELATED SUBSTANCES 2008

as Agreed by the National Football League Players Association and the National Football League Management Council

NATIONAL FOOTBALL LEAGUE POLICY ON ANABOLIC STEROIDS AND RELATED SUBSTANCES

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NATIONAL FOOTBALL LEAGUE POLICY ON ANABOLIC STEROIDS AND RELATED SUBSTANCES

1. General Statement of Policy

The National Football League prohibits the use of anabolic/androgenic steroids (including exogenous testosterone), stimulants, human or animal growth hormones, whether natural or synthetic, and related or similar substances. (*See* Appendix A). For convenience, these substances, as well as masking agents or diuretics used to hide their presence, will be referred to as "Prohibited Substances".[1] These substances have no legitimate place in professional football. This policy specifically means that:

-- **PLAYERS** may not, under any circumstances, have Prohibited Substances in their systems or supply or facilitate the distribution of Prohibited Substances to other players.

-- **COACHES, TRAINERS, OR OTHER CLUB PERSONNEL** may not condone, encourage, supply, or otherwise facilitate in any way the use of Prohibited Substances.

-- **TEAM PHYSICIANS** may not prescribe, supply, or otherwise facilitate a player's use of Prohibited Substances.

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[1] An illustrative list of Prohibited Substances (*see* Appendix A) is attached to this Policy. Please note that, in addition to the substances specifically named, other categories and related substances can also violate the Policy.

-- **All PERSONS**, including players, are subject to discipline by the Commissioner for violation of this Policy or of laws relating to possession and/or distribution of Prohibited Substances, or conspiracy to do so.

The League's concern with the use of Prohibited Substances is based on three primary factors.

First, these substances threaten the fairness and integrity of the athletic competition on the playing field. Players use these substances for the purpose of becoming bigger, stronger, and faster than they otherwise would be. As a result, their use threatens to distort the results of games and League standings. Moreover, players who do not wish to use these substances may feel forced to do so in order to compete effectively with those who do. This is obviously unfair to those players and provides sufficient reason to prohibit their use.

Second, the League is concerned with the adverse health effects of using Prohibited Substances. Although research is continuing, steroid use has been linked to a number of physiological, psychological, orthopedic, reproductive, and other serious health problems, including heart disease, liver cancer, musculoskeletal growth defects, strokes, and infertility.

Third, the use of Prohibited Substances by NFL players sends the wrong message to young people who may be tempted to use them. High school and college students are using these substances with increasing frequency, and NFL players should not by their own conduct suggest that such use is either acceptable or safe, whether in the context of sports or otherwise.

The NFL Player Contract specifically prohibits the use of drugs in an effort to alter or enhance performance. The NFL Player Contract and the League's Constitution and Bylaws require each player to avoid conduct detrimental to the NFL and professional football or to public confidence in the game or its players. The use of Prohibited Substances violates both these provisions. In addition, the Commissioner is authorized to protect the integrity of and public confidence in the game. This authorization includes the authority to forbid use of the substances prohibited by this Policy.

2. Administration of the Policy

As agreed in the 1993 Collective Bargaining Agreement, the program is conducted under the auspices of the NFL Management Council. The program will be directed by the Independent Administrator on Anabolic Steroids and Related Substances ("Independent Administrator"). The Independent Administrator shall have the sole discretion to make determinations regarding the method by which players will be subjected to testing each week; selecting which players will be tested each week; deciding when tests will be administered; determining the number and frequency of reasonable cause tests to be administered (subject to the collectively-bargained maximum of 24 tests per player per year); determining the number and timing of off-season tests to be administered (subject to the collectively-bargained maximum of 6 tests per player); analyzing test results data over time; conducting medical evaluations associated with the possible use of prohibited substances; granting "therapeutic use exemptions;" communicating with, instructing, and overseeing the work of the independent specimen collection

group; deciding whether there is credible evidence that a player has failed to cooperate with testing, attempted to dilute, tamper with, or substitute a specimen to defeat testing, or otherwise violated protocols; and certifying violations for disciplinary or administrative action. In addition, he will make himself available for consultation with players and Club physicians; oversee the development of educational materials; participate in research on steroids; confer with the Consulting Toxicologist;[2] and serve on the League's Advisory Committee on Anabolic Steroids and Related Substances.[3]

Neither the NFL, the NFLPA, nor any NFL Member Club directs the specific testing schedule, decides which players will be tested, or influences the Independent Administrator's determination whether a potential violation has occurred and should be referred for further action.

3. Testing for Prohibited Substances

A. Types of Testing

All testing of NFL players for Prohibited Substances, including any pre-employment testing, is to be conducted pursuant to this Policy. All specimens will be

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[2] The Consulting Toxicologist on Anabolic Steroids and Related Substances ("Consulting Toxicologist") will consult on testing procedures and results, laboratory quality, and other issues referred to him by the Independent Administrator. For more information, *see* Appendix B ("Personnel").

[3] The Advisory Committee on Anabolic Steroids and Related Substances is appointed by the Commissioner and chaired by the Independent Administrator.

collected by an authorized specimen collector and tested at the appropriate laboratory (*see* Section 3D below). As is the case in the employment setting, players testing positive in a preemployment setting will be subject to medical evaluation and clinical monitoring as set forth in Sections 3A, 4C and 12, and to the disciplinary steps outlined in Section 6.

Testing will take place under the following circumstances:

Pre-Employment: Pre-employment tests may be administered to free agent players (whether rookies or veterans). In addition, the League will conduct tests at its annual timing and testing sessions for Draft-eligible football players.

Annual: All players will be tested for Prohibited Substances at least once per League Year. Such testing will occur at training camp or whenever the player reports thereafter, and will be deemed a part of his preseason physical.

Preseason/Regular Season: Each week during the preseason and regular season, ten (10) players on every team will be tested. By means of a computer program, the Independent Administrator will randomly select the players to be tested from the Club's active roster, practice squad list, and reserve list who are not otherwise subject to ongoing reasonable cause testing for steroids. The number of players selected for testing on a particular day will be determined in advance on a uniform basis. Players will be required to test whenever they are selected, without regard to the number of times they have previously been tested.

Postseason: Ten (10) players on every Club qualifying for the playoffs will be tested periodically so long as the Club remains active in the postseason. Players to be tested during the postseason will be selected on the same basis as during the regular season.

Off-Season: Players under contract who are not otherwise subject to reasonable cause testing may be tested during the off-season months up to 6 times at the discretion of the Independent Administrator. Players to be tested in the off-season will be selected on the same basis as during the regular season, irrespective of their off-season locations. Any player selected for testing during the off-season will be required to furnish a urine specimen at a convenient location acceptable to the Independent Administrator. Only players who advise in writing that they have retired from the NFL will be removed from the pool of players who may be tested. If, however, a player thereafter signs a contract with a Club, he will be placed back in the testing pool.

Reasonable Cause Testing For Players With Prior Positive Tests Or Under Other Circumstances: Any player testing positive for a Prohibited Substance, including players testing positive in college or at a scouting combine session, or with otherwise documented prior steroid involvement, will be subject to ongoing reasonable cause testing at a frequency determined by the Independent Administrator. Such players will be subject to ongoing reasonable cause testing both in-season and during the off-season. Reasonable cause testing may also be required when, in the opinion of the Independent Administrator, available information provides a reasonable basis to con-

clude that a player may have violated the Policy or may have a medical condition that warrants further monitoring. (*See* Section 12.)

B. Testing Procedures

In-season tests will ordinarily be conducted on two days each week, and each player to be tested will be notified on the day of the test. On the day of his test, the player will furnish a urine specimen to the authorized specimen collector. To prevent evasive techniques, all specimens will be collected under observation by an authorized specimen collector. Specimens will be shipped in collection bottles with tamper-resistant seals. Each bottle will be identified by a control identification number, not by the player's name. The player will be given an opportunity to witness the procedure and to sign the chain-of-custody form.

For more detailed information, *see* Appendix C ("Collection Procedures").

C. Failure or Refusal to Test/Efforts to Manipulate Specimen or Test Result

An unexcused failure or refusal to appear for required testing, or to cooperate fully in the testing or evaluation process, will warrant disciplinary action. Any effort to substitute, dilute or adulterate a specimen, or to manipulate a test result to evade detection will be considered a violation of the Policy and likely will result in more severe discipline than would have been imposed for a positive test.

D. Testing Laboratories

The Independent Administrator will determine the most appropriate laboratory or laboratories to perform testing under the Policy. Currently, the UCLA Olympic Analytical Laboratory in Los Angeles and the Sports Medicine Research and Testing Laboratory in Salt Lake City have been approved to analyze specimens collected for Prohibited Substances. These laboratories have been accredited by ISO and the World Anti-Doping Association for anti-doping analysis and testing for the NCAA, the United States Anti-Doping Agency and other sports organizations.

Screening and confirmatory tests will be done on state-of-the-art equipment and will principally involve use of GC/MS or LC/MS equipment. In addition, testing will be done for masking agents (including diuretics) as appropriate.

E. Unknowing Administration of Prohibited Substances

Players are responsible for what is in their bodies, and a positive test result will not be excused because a player was unaware that he was taking a Prohibited Substance. If you have questions or concerns about a particular dietary supplement or other product, you should contact Dr. John Lombardo at (614) 442-0106. As the Independent Administrator, Dr. Lombardo is authorized to respond to players' questions regarding specific supplements. You may also contact the NFL/NFLPA Supplement Hotline at (866) NFL-SUPP or NFLSupp@DrugFreeSport.com. **Having your Club's medical or training staff approve a supplement will not excuse a positive test result.**

4. Procedures In Response to Positive Tests or Other Evaluation

(*See* Appendix D for a full outline of procedures normally followed after a positive test result.)

A. Notification

Once a positive result is confirmed, the Independent Administrator will notify the player and the League Office.

B. Re-Test of Split Sample

Unless waived, any player testing positive from the first or "A" bottle will be afforded a test of the other portion of his specimen from the second or "B" bottle.

The player may not be present for the "B" test; however, except for pre-employment tests, at the player's request and expense the "B" test may be observed by a qualified toxicologist not affiliated with a commercial laboratory. The "B" test will be performed at the same laboratory that did the original test according to the procedures used for the original test and by a technician other than the one performing the original confirmation test on the "A" bottle. The player will be notified of the results in writing as soon as practicable.

C. Medical Evaluation

A medical examination such as outlined in Appendix E may be required of any player who tests positive. The Independent Administrator will arrange for the evaluation, and the results of this evaluation will be reported to the player, the Independent Administra-

tor, and the Club physician. If medical treatment (including counseling or psychological treatment) is deemed appropriate, it will be offered to the player. Players with a confirmed positive test result will also be placed on reasonable cause testing at a frequency to be determined by the Independent Administrator.

The player is responsible for seeing that he complies with the arrangements of the Independent Administrator for an evaluation as soon as practicable after notification of a positive test. This requirement is in effect throughout the year.

5. Discipline for Violation of Law

Players or other persons within the NFL who: are convicted of or otherwise admit to a violation of law (including within the context of a diversionary program, deferred adjudication, disposition of supervision, or similar arrangement) relating to use, possession, acquisition, sale, or distribution of steroids, growth hormones, stimulants or related substances, or conspiring to do so; or are found through sufficient credible evidence (*e.g.*, authenticated medical or pharmacy records indicating receipt or use of banned substances; corroborated law enforcement reports) to have used, possessed or distributed performance enhancing substances, are subject to discipline by the Commissioner, including suspension or, if appropriate, termination of the individual's affiliation with an NFL Club. Any suspension shall be without pay and served as set forth below. Longer suspensions may be imposed for repeat offenders. In addition, players violating this Policy by a violation of law will be appropriately placed or advanced within the three-step program. In

this respect, players are reminded of federal legislation which criminalizes possession and distribution of steroids. (*See* Appendix H.)

6. Suspension and Related Discipline

Players with a confirmed positive test result will be subject to discipline by the Commissioner as outlined in the Policy below.

Step One: The first time a player violates this Policy by testing positive; attempting to substitute, dilute or adulterate a specimen; manipulating a test result; or by violation of law (*see* Section 5), he will be suspended without pay for a minimum of four regular and/or postseason games. The suspension will begin on the date set in the League's notification to the player of his suspension, subject to any appeal (*see* Section 10). If fewer than four games remain in the season, including any postseason games for which the Club qualifies, the suspension will carry over to the next regular season, until a total of four regular and/or postseason games have been missed.

If the imposition of a player's suspension occurs prior to or during the preseason, the player will be permitted to engage in all preseason activities. Upon the posting of final rosters, however, he will be suspended for four regular-season games.

In addition, the player will be subject to evaluation and counseling if, in the opinion of the Independent Administrator, such assistance is warranted.

Step Two: The second time a player violates this Policy by testing positive; attempting to substitute, dilute

or adulterate a specimen; manipulating a test result; or by violation of law (*see* Section 5), he will be suspended without pay for a minimum of eight regular and/or postseason games. The suspension will begin on the date set in the League's notification to the player of his suspension, subject to any appeal (*see* Section 10). If there are fewer than eight regular and/or postseason games remaining in the season, including any postseason games for which the Club qualifies, the suspension will continue into the next regular season until a total of eight regular and/or postseason games have been missed.

Step Three: The third time a player violates the Policy by testing positive; attempting to substitute, dilute or adulterate a specimen; manipulating a test result; or by violation of law (*see* Section 5), he will be suspended without pay for a period of at least 12 months, subject to any appeal (*see* Section 10). Such a player may petition the Commissioner for reinstatement after 12 months. Reinstatement, and any terms and conditions thereof, shall be matters solely within the Commissioner's sound discretion.

Players who are suspended under this Policy will be placed on the *Reserve/Commissioner Suspension* list. During the period that he is suspended (subject to the preseason activities permitted for Step One violations), the player will not be paid, nor may he participate in team activities, use the Club's facilities or have contact with any Club officials except to arrange off-site medical treatment.

In addition to the suspension imposed on him, any player suspended for a violation of the Policy will be

ineligible for selection to the Pro Bowl, or to receive any other honors or awards from the League or the NFL Players Association, for the season in which the violation is upheld (*i.e.*, following any appeals) and in which the suspension is served.

7. Procedures Regarding Testosterone

The Independent Administrator is authorized to subject a percentage of all specimens to Carbon Isotope Ratio (CIR) testing to detect the use of exogenous testosterone.

If the introduction of testosterone or the use or manipulation of any other substance results in increasing the ratio of the total concentration of testosterone to that of epitestosterone in the urine to greater than 4:1, the test will be considered presumptively positive. Tests showing a ratio greater than 10:1 will be considered conclusively positive. Notwithstanding, when information available to the Independent Administrator suggests but is not conclusive of testosterone use, the Independent Administrator may require the player to submit to ongoing reasonable cause testing and shall order other medical procedures including Carbon Isotope Ratio Testing or other diagnostic tests to confirm whether exogenous testosterone has been used in violation of the Policy. In addition, the Independent Administrator will be entitled to review any available past and/or current medical or testing records.

In addition, the use of epitestosterone to lower a player's T:E ratio is prohibited. When such use is detected or reasonably suspected by the Independent Administrator, additional diagnostic tests may be re-

quired if the Independent Administrator deems it necessary. If a player's epitestosterone level exceeds 200 ng/mL, it will be considered a positive test result regardless of the player's T:E ratio.

If on the basis of such follow-up tests, records, prior or subsequent test results, discussions with the player, or other studies, the Independent Administrator subsequently concludes that the test results do in fact reflect the player's use of steroids, the player will be subject to discipline according to the terms of the Policy. Such discipline may be imposed within the season of the year in which the positive test occurred, or, if the Independent Administrator prescribes follow-up measures that entail delay in the final determination, in a subsequent season.

8. Masking Agents and Supplements

The use of so-called "blocking" or "masking" agents is prohibited by this Policy. These include diuretics or water pills, which have been used in the past by some players to reach an assigned weight.

In addition, a positive test will not be excused because it results from the use of a dietary supplement, rather than from the intentional use of a Prohibited Substance. Players are responsible for what is in their bodies. For more information concerning dietary supplements, *see* Appendix F.

9. Examination in Connection with Reinstatement

Before a player is reinstated following a suspension, he must test negative for all Prohibited Substances

under this policy and must be approved as fit for play by the Independent Administrator. In addition, the player must be examined by the Club physician before he may participate in contact drills or in a game.

10. Appeal Rights

As is more fully outlined in Appendix D, any player who is notified by the League Office that he is subject to discipline for a violation of this Policy is entitled to an appeal.

The League will designate a time and place for a hearing, at which either the Commissioner or his designee will preside as Hearing Officer. The player may be accompanied by counsel and may present relevant evidence or testimony in support of his appeal. Additionally, the NFL Players Association may attend and participate notwithstanding the player's use of other representation.

After the record has been closed, the Hearing Officer will issue a written decision, which will constitute a full, final, and complete disposition of the appeal and which will be binding on all parties. (If appropriate, a summary ruling may be issued followed by a formal written decision as time permits.) Pending completion of this appeal, the suspension or other discipline will not take effect.

11. Burdens and Standards of Proof; Discovery

Upon appeal of a positive test result, the League shall have the initial burden to establish a prima facie violation of the Policy, and the specimen collectors, Independent Administrator, Consulting Toxicologist and

testing laboratories will be presumed to have collected and analyzed the player's specimen in accordance with the Policy. The player may, however, rebut that presumption by establishing that a departure from the Policy's stated protocols occurred during the processing of his specimen. In such case, the League shall have the burden of establishing that the departure did not materially affect the validity of the positive test or other violation.

In presenting an appeal under this Policy, the player shall be entitled to access to only the information upon which the disciplinary action was based; in no event shall a player have access to records, reports or other information concerning the application of this Policy to any other player. Notwithstanding, this provision does not limit the Players Association's access to appropriate information concerning all violations under this Policy.

12. Reasonable Cause Testing

Reasonable cause testing procedures are more fully outlined in Section 3A of the Policy.

No Club may require any player to submit to reasonable cause testing without the agreement of both the team physician and the Independent Administrator.

In addition, players on reasonable cause testing may be removed from their Club's active roster and placed in the category of *Reserve/Non-Football Illness* if, after consultation with the Club physician, it is the Independent Administrator's opinion that such a step is medically necessary.

13. Confidentiality

A. Scope

The confidentiality of players' medical conditions and test results will be protected to the maximum extent possible, recognizing that players who are disciplined for violating this Policy will come to the attention of and be reported to the public and the media.

B. Discipline for Breach of Confidentiality

Any Club or Club employee that publicly divulges, directly or indirectly, information concerning positive tests or other violations of this Policy (including numerical summaries or specific names of persons) or otherwise breaches the confidentiality provisions of this Policy is subject to a fine of up to $500,000 by the Commissioner.

14. Bonus Forfeiture

The computation of the amount a player must forfeit and return to his Club as a result of violating this Policy is set forth in Appendix J of the Policy.

15. Eligibility of Persons Suspended by Other Organizations

Any person who has been suspended from competition by a recognized sports testing organization based on: (a) a positive test result reported by a World Anti-Doping Agency accredited laboratory for a substance banned under this Policy; (b) an effort to substitute,

manipulate or otherwise fail to cooperate fully with testing; or (c) a violation of law or admission involving the use of steroids or other performance-enhancing substances, shall be permitted to enter into an NFL Player Contract or Practice Contract. Such person, however, will be placed on reasonable cause testing and will be immediately advanced to Step Two of the Policy subject to a minimum eight-game suspension upon subsequent violation.

APPENDIX A

List of Prohibited Substances

The following substances and methods are prohibited by the National Football League:

I. ANABOLIC AGENTS

A. ANABOLIC/ANDROGENIC STEROIDS:

Generic Name	Brand Names (Examples)
Androstenediol	Androstederm
Androstenedione	Androstan, Androtex
1-Androstenedione	---
Bolasterone	Myagen
Boldenone	Equipoise, Parenabol
Calusterone	---
Clostebol	Turinabol, Steranabol
Danazol	Cyclomen, Danatrol
Dehydrochloromethyl-testosterone	Oral-Turinabol
Dehydroepiandrosterone	DHEA
Desoxymethyltestosterone	DMT, Madol
Dihydrotestosterone	DHT, Stanolone
Dromostanolone	Drolban
Ethylestrenol	Maxibolin, Orabolin
Fluoxymesterone	Halotestin
Formebolone	Esiclene, Hubernol
Furazabol	Miotolon
Gestrinone	Tridomose
17-Hydroxypregnenedione	
17-Hydroxyprogesterone	---
Hydroxytestosterone	---
Mestanolone	---
Mesterolone	Proviron

Methandienone	Danabol, Dianabol
Methandriol	Androdiol
Methandrostenolone	Dianabol
Methenolone	Primobolan
Methyltestosterone	Metandren
Mibolerone	Testorex
19-Norandrostenediol	19-Diol

I. Anabolic/Androgenic Steroids (cont'd)

Generic Name	Brand Names (Examples)
19-Norandrostenedione	19 Nora Force
Norbolethone	Genabol
Norclostebol	---
Norethandrolone	Nilevar
Normethandrolone	---
19-Nortestosterone (Nandrolone)	Deca-Durabolin
Oxandrolone	Anavar, Lonovar
6-Oxoandrosterone	6-Oxo
Oxymesterone	Oranabol
Oxymetholone	Anadrol
Progesterone	---
Stanozolol	Stromba, Winstrol
Stenbolone	---
Testosterone	Andronate
1-Testosterone	---
Tetrahydrogestrinone	THG
Trenbolone	Finaject

and related substances

B. HORMONES:

Generic Name	Brand Names (Examples)
Human Growth Hormone	Saizen, Humatrope, Nutro-

pin (hGH)	AQ
Animal Growth Hormones	---
Human Chorionic Gonadotropin (hCG)	Novarel, Menotropins
Insulin Growth Factor (IGF-1)	---
Erythropoietin (EPO)	---

and related substances

C. BETA-2-AGONISTS (Clenbuterol, etc.)

D. ANTI-ESTROGENIC AGENTS (Anastrozole [Arimidex], Clomiphene [Clomid], Cyclofenil, Tamoxifen)

II. MASKING AGENTS

A. DIURETICS

Generic Name	Brand Names (Examples)
Acetazolamide	Amilco
Amiloride	Midamor
Bendroflumethiazide	Aprinox
Benzthiazide	Aquatag
Bumetanide	Burine
Chlorothiazide	Diuril
Cyclothiazide	Anhydron
Ethacrynic Acid	Edecrin
Flumethiazide	---
Furosemide	Lasix
Hydrochlorothiazide	Aprozide
Hydroflumethiazide	Leodrine
Methyclothiazide	Aquatensen
Metolazone	Zaroxolyn
Polythiazide	Renese
Probenecid	Benemid

Quinethazone	Hydromox
Spironolactone	Aldactone
Triamterene	Jatropur, Dytac
Trichlormethiazide	Anatran

and related substances

B. EPITESTOSTERONE

C. PROBENECID

D. FINASTERIDE (Propecia, Proscar)

III. CERTAIN STIMULANTS

Generic Name	Brand Names (Examples)
Amphetamine	Greenies, Speed
Ephedrine	Ma Huang, Chi Powder
Fenfluramine	Phen-Fen, Redux
Methamphetamine	---
Methylephedrine	---
Methylphenidate	Ritalin, Daytrana, Metadate, Methylin
Modafinil	---
Norfenfluramine	---
Pseudoephedrine*	Sudafed, Actifed
Phentermine	Fastin, Adipex, Ionamin
Synephrine	Bitter Orange, Citrus Aurantium

* Except as properly prescribed by Club medical personnel.

IV. DOPING METHODS

Introduction of a Prohibited Substance into the body by any means, including but not limited to the introduction of a Prohibited Substance, or the ingestion or injection of a supplement or other product containing a Prohibited Substance.

Pharmacological, chemical or physical manipulation by, for example, catheterization, urine substitution, tampering, or inhibition of renal excretion by, for example, probenecid and related compounds.

APPENDIX B

Personnel

The Independent Administrator of the NFL Policy on Anabolic Steroids and Related Substances is Dr. John Lombardo, who is currently Medical Director of the Max Sports Medicine Institute and Clinical Professor in the Department of Family Medicine at the Ohio State Medical School. He also was previously a member of the faculty at the Sports Medicine Center of the Cleveland Clinic and has served as team physician to the Cleveland Cavaliers of the NBA and as an adviser on steroid issues to both the NCAA and the Olympic Committee.

The Consulting Toxicologist on Anabolic Steroids and Related Substances is Dr. Bryan Finkle, a board-certified forensic toxicologist and Research Professor of Pharmacology-Toxicology in the College of Pharmacy and Department of Pathology in the College of Medicine at the University of Utah Health Sciences Center. He also serves as a consultant to the International Olympic Committee Medical Commission, World Anti-Doping Agency and United States Anti-Doping Agency.

APPENDIX C

Collection Procedures

Upon reporting to the collection site, the player to be tested shall be required to produce a government-issued photo ID. Once his identity is confirmed, the player will be given the opportunity to select a sealed urine specimen cup. The player will furnish a urine specimen under observation by an authorized specimen collector. Thereafter, the player will be given the opportunity to select a sealed collection kit which will be used to store and ship his urine specimen. In the player's presence, the specimen will be split between an "A" bottle and a "B" bottle and sealed with security seals. The specimen collector will note any irregularities concerning the specimen, following which the player will be given the opportunity to sign the chain-of-custody form.

Once the bottles have been sealed and the chain-of-custody form has been completed, the bottles will be inserted into containers and placed back into the kit. The kit will then be sealed and sent by Federal Express or similar carrier to the appropriate testing laboratory.

All bottles will be identified by a control identification number. The number on the bottles will be the same as the number on the chain-of-custody form. The testing laboratories themselves will be unable to associate any specimen with an individual player.

APPENDIX D

Procedures Following Positive or Presumptively Positive Tests

The following will outline the procedures to be used following the testing laboratory's notification to the Independent Administrator of a positive "A" test:

A. Standard Tests

1. The Independent Administrator will match the control identification number with the player's name, and will then notify the player in writing of the positive result and request that the player call him to discuss the result.

2. If the player wishes to have the "B" sample test observed by a qualified toxicologist, he must notify the Independent Administrator in writing within five (5) business days of receiving written notification of the positive test result. If observation is requested, the Independent Administrator will schedule the test for the first mutually available date. Otherwise, in the absence of a reasonable basis for delay, the "B" sample test will be initiated within seven (7) business days following player's receipt of written notification of the positive test or as soon as possible following the Independent Administrator's receipt of written notification by the player that he does not wish the test to be observed, whichever is sooner.

3. The laboratory will report the "B" sample test result to the Independent Administrator, who

may review the case with the Consulting Toxicologist and the laboratory director as appropriate.

4. The Independent Administrator will report his findings to the player and, if confirmed positive or if reasonable cause testing is indicated, to the team physician and League Office.

5. If the player is subject to disciplinary action, the League Office will notify him in writing.

6. If the player decides to appeal, he must so indicate in writing within five (5) business days after receiving a notice of discipline from the League Office. He should state in his notice of appeal whether or not he desires a hearing.

7. If a hearing is requested, the League will schedule it to take place within twenty (20) calendar days of the request absent mutual agreement or extenuating circumstances. The hearing may be conducted by conference call upon agreement of the parties.

8. Prior to the hearing, the League will provide the player and NFL Players Association with a laboratory documentation package prepared in accordance with Appendix I. In the absence of clear evidence to the contrary, such package will be deemed full and complete for the purpose of evaluating the integrity of the chain-of-custody and test results. Once the player has had sufficient opportunity to review the documentation package, he must provide to the League a written statement setting forth the

specific grounds of his appeal. Additionally, no later than two (2) business days prior to the hearing the parties will exchange copies of any documents or other evidence on which they intend to rely and a list of witnesses expected to provide testimony. Following the exchange, the parties may provide further supplementation as appropriate.

9. Once the record is closed, the Hearing Officer will evaluate the evidence and render a written decision with respect to disciplinary action within five (5) calendar days. (If appropriate, a summary ruling may be rendered, followed by a formal decision as time permits.)

B. Pre-Employment Tests

When notified of a positive test result obtained in connection with Pre-Employment Testing, the procedure set forth in Part A above shall apply, except that:

1. The "B" sample test will be conducted on the first available date without the opportunity for observation by an outside toxicologist.

2. Upon confirmation of the positive test result, the Independent Administrator shall promptly notify the League Office and: all Clubs in the case of a Combine test, and the requesting Club(s) in the case of a Free Agent test.

The League will endeavor to conduct and conclude these procedures expeditiously, with appropriate regard to the possible need for follow-up tests or other measures required in the Independent Administrator's

judgment, or other extenuating circumstances.

APPENDIX E

Examples of Medical Evaluations Following a Positive Test

A. Initial Positive Test

History and Physical

Emphasize: Cardiovascular
Abdominal
Genitourinary (testicle, prostate, impotence, sterility)
Psychological (aggressiveness, paranoia, dependency, mental status)
Immune system (masses, infections, lymphadenopathy)

Testing

CBC with Differential
General chemistry panel
Electrolytes, BUN/Creatinine, Glucose, Liver enzymes
Lipid Assay
Triglycerides/cholesterol, HDL-C, LDL-C
Urinalysis
Cardiovascular
EKG
Chest X-ray
Stress test
Echocardiogram
Semen analysis
Endocrine Profile
TSH, LH, FSH, T4, TBG, Testosterone, SHBG (TBG), Cortisol, ACTH, Serum, Beta hCG

Liver scan (either MRI or CT or Ultrasound or liver/spleen Scan)
CT scan of chest/abdomen
MRI of brain (with attention to pituitary gland)
Ultrasound of testes

B. Repeat Positive Test Evaluation+

History and Physical - as above

Testing - Lab as above
CV } As indicated by time since last test
and
Liver scan } by history and physical

APPENDIX F

POLICY ON ANABOLIC STEROIDS AND RELATED SUBSTANCES
-Use of Supplements-

Over the past several years, we have made a special effort to educate and warn players about the risks involved in the use of "nutritional supplements." Despite these efforts, several players have been suspended even though their positive test result may have been due to the use of a supplement. Subject to your right of appeal, **if you test positive or otherwise violate the Policy, you *will* be suspended**. You and you alone are responsible for what goes into your body. Claiming that you used only legally available nutritional supplements will not help you in an appeal.

As the Policy clearly warns, supplements are not regulated or monitored by the government. This means that, even if they are bought over-the-counter from a known establishment, there is currently no way to be sure that they:

(a) contain the ingredients listed on the packaging;

(b) have not been tainted with prohibited substances; or

(c) have the properties or effects claimed by the manufacturer or salesperson.

Therefore, if you take these products, you do so AT YOUR OWN RISK! For your own health and success in the League, we strongly encourage you to avoid

the use of supplements altogether, or at the very least to be extremely careful about what you choose to take.

Take care and good luck this season.

Sincerely,

HAROLD HENDERSON	*GENE UPSHAW*
Executive Vice President National Football League	Executive Director NFL Players Association

APPENDIX G

To: NFL Players
From: Dr. John Lombardo
Subject: Supplements

Gene Upshaw and representatives from the NFLPA along with Harold Henderson and representatives from the NFL Management Council recently met with me and a number of my colleagues to discuss dietary supplements and their interrelationship with the NFL Policy on Anabolic Steroids and Related Substances.

Upon the conclusion of the meeting all participants felt that I should advise you of both health and policy violation risks you may be faced with by adding over-the-counter supplements to your diet.

In 1994, the U.S government passed a law entitled "The Dietary Supplement Health and Education Act". As a result of this law, the supplement manufacturers and distributors do not have to prove the effectiveness or the safety of their products. Also, the ingredients of the supplements are not checked by any independent agency, such as the Food and Drug Administration (FDA), to certify the contents of the supplements. **Therefore, the effectiveness, side effects, risks and purity of many products you can buy at the health food store are unknown.**

This law also permits over-the-counter sale of products that violate the NFL's policy. For example, DHEA, a steroidal hormone that serves as a direct precursor for the synthesis of testosterone, is widely advertised. However, since this substance is found in some plants and animals, manufacturers currently are

allowed to market it as a dietary supplement. This product, like many other supplements that contain substances that violate the policy, can be purchased at your local health food store and, when ingested, is no different than taking illegal anabolic steroids or related substances.

If you take supplements that contain a substance that violates the policy it will subject you to discipline. More importantly, you run the risk of harmful health effects associated with their use.

I will continue to provide you with information on the subject throughout the year. In the meantime, if you have any questions about supplements or the steroid policy, please contact me.

JOHN A. LOMBARDO, M.D.
Independent Administrator of the NFL Policy on
Steroids and Related Substances

APPENDIX H

U.S. Department of Justice
Drug Enforcement
Administration
Washington, D.C. 20537
September 4, 2001

Mr. Paul Tagliabue
Commissioner
National Football League
410 Park Avenue
New York, New York 10022

Dear Commissioner Tagliabue:

Thank you for your concern regarding the policies of the Drug Enforcement Administration (DEA) in enforcing the Anabolic Steroids Control Act of 1990 and the National Football League's (NFL) policies to eliminate the use of anabolic steroids in the NFL.

Your program of random and reasonable cause testing for steroids reinforces the provisions of the Anabolic Steroids Control Act of 1990. Under this law, DEA has the responsibility to regulate all aspects of the legitimate steroid industry, including doctors and pharmacists.

To those who use anabolic steroids, including professional athletes, I should emphasize that under the Act, possession of even personal use quantities not validly prescribed by a doctor is a federal crime. The maximum penalty for simple possession (possession not for sale), is one year in a federal prison and a minimum $1,000 fine.

DEA will also investigate and prosecute violations involving the unlawful manufacture, distribution, and importation of anabolic steroids. Doctors who prescribe anabolic steroids for other than legitimate purposes will be prosecuted. Pharmacists who dispense anabolic steroids without a doctor's prescription or with one that they know is bogus, will also be prosecuted.

While DEA's primary focus is law enforcement, we also recognize the importance of public education on matters such as these. I would thus appreciate it if you would make this letter directly available to each NFL team, its players, physicians, trainers, and other personnel.

Sincerely,
[*Signature on file*]
Asa Hutchinson
Administrator

APPENDIX I

Standard Form of Documentation Package

Tab	Item(s)
1.	Cover Sheet
2.	Table of Contents
3.	General Overview of Laboratory Procedures
4.	Custody and Control Forms
	a. External Chain of Custody Form
	b. Specimen Chain of Custody
5.	Initial Test Information (A-Bottle)
6.	Confirmation Test Information
	a. Confirmation Test Description
	b. Chain of Custody Pull List
	c. Confirmation Aliquot Chain of Custody Log
	d. Specimen ID Verification Report
	e. Analytical Data
7.	Certification Information
	a. Pending Positive Report (Certifying Scientist Worksheet)
	b. Laboratory Report
8.	Re-Test Information (B-Bottle)
	a. Chain of Custody Pull List
	b. Confirmation Aliquot Chain of Custody Log
	c. Specimen ID Verification Report
	d. Analytical Data
9.	Re-Test Certification Information
	a. Pending Positive Report (Certifying Scientist Worksheet)
	b. Laboratory Report

APPENDIX J

Calculation of Bonus Forfeiture

A Player who is suspended under this Policy shall forfeit and return to his Club (or forgo entitlement to unpaid portions of) the proportionate amount of his signing bonus corresponding to the period of the suspension; provided that, if (a) the suspension is for a period of one year or more, (b) the Player's Contract is tolled during such suspension, and (c) the Player subsequently performs under the Contract during the extended period that results from the tolling, then the Player shall earn back the proportionate amount of forfeited or forgone signing bonus for the extended period in which he performs. For purposes of this Section, "proportionate amount" means 1/17th of the signing bonus allocation for each regular season week or regular season game missed per League Year covered by the suspension, or 1/17th of the forfeited or forgone signing bonus allocation for each regular season week or regular season game subsequently played per extended year of the Player's Contract, in the case of a Player earning back previously forfeited or forgone signing bonus.

By way of example, without limitation on any other example, if a Player with a four-year Player Contract for the 2006-2009 League Years that contains a signing bonus of $4 million is suspended for the 2007 and 2008 League Years for violation of the Policy, then the Player would forfeit and return to his Club $2 million in signing bonus allocation ($1 million for the 2007 League Year and $1 million for the 2008 League Year). If, after performing under the Player Contract

in the 2009 League Year, the Player then performed one of his previously tolled years in the 2010 League Year, he would earn back $1 million. If the Player then performed for eight games of the second of his previously tolled years in the 2011 League Year and then retired, he would earn back an additional $470,588 (8/17 x $1 million).

No. 09-1380

IN THE

Supreme Court of the United States

THE NATIONAL FOOTBALL LEAGUE,

Petitioner,

v.

KEVIN WILLIAMS AND PAT WILLIAMS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Kevin Williams and Pat Williams ("Williamses" or "Respondents") are professional football players employed by the National Football League ("NFL" or "Petitioner"). The Williamses play for the Minnesota Vikings. The NFL, by conducting drug testing in the State of Minnesota, had an obligation to know and to abide by Minnesota State drug testing laws. It failed in both regards.

The NFL contends that § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, preempts certain Minnesota state statutory claims which regulate drug testing. The NFL is wrong. The federal district court considered the NFL's arguments and defenses; determined that the Williamses' claims were not preempted by the LMRA; and properly remanded the state law claims to state court.

A bench trial was held on claims brought under the Drug and Alcohol Testing in the Workplace Act ("DATWA"), Minn. Stat. § 181.950-957. Pet. App. 93a-114a. The NFL was found to have violated DATWA but the trial court declined to continue the injunction that prevented the NFL from suspending the Williamses. The Williamses have appealed whether it was error for the trial court to decline to issue a permanent injunction in light of the NFL's violation of DATWA. Briefing in the Minnesota Court of Appeals is complete and the parties await oral argument.

The question presented is whether this Court should exercise *certiorari* review where (a) the underlying dispute could be rendered moot within a few months by affirmance of the Minnesota appellate courts of the decision allowing for the suspension of

the Williamses; (b) a threshold jurisdictional defect precludes this Court's review altogether because, under 28 U.S.C. § 1447(d), appeals from orders remanding cases to state courts are not appealable, notwithstanding this Court's holding to the contrary in *Carlsbad Tech., Inc. v. HIF BIO, Inc.*, __ U.S. __, 129 S. Ct. 1862 (2009), premised on *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), which "was questionable in its day and is ripe for reconsideration in the appropriate case," *Carlsbad*, 129 S. Ct. at 1868 (Scalia, J., concurring); (c) where the question purportedly presented by the Petition — whether defenses are relevant in a § 301 preemption analysis — arises only in connection with a claim brought pursuant to the Lawful Consumable Products Act ("LCPA"), Minn. Stat. § 181.938, on which the NFL obtained summary judgment in a ruling from which the Williamses have not appealed; and (d) no circuit split is presented.

PARTIES TO THE PROCEEDING

The caption contains the names of all of the parties to this proceeding.

The National Football League Players Association, the National Football League Management Council, Adolpho Birch, Dr. John Lombardo, and Dr. Brian Finkle were parties in the consolidated proceedings below, but are neither petitioners nor respondents in this Court.

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BRIEF OF RESPONDENTS IN OPPOSITION

Respondents Kevin Williams and Pat Williams respectfully submit this brief in opposition to the Petition filed by the NFL.

The Petition should be denied because it may well be rendered moot before the Court could render a decision on the merits; because the Court lacks jurisdiction over the appeal under 28 U.S.C. § 1447(d); because the question purportedly presented is not actually presented given the NFL's state court victory on respondents' LCPA claims; and, because there is no relevant disagreement among the courts of appeals requiring the Court's resolution.

OPINION BELOW

The opinion of the court of appeals is reported at 582 F.3d 863. Pet. App. 1a. The court of appeals decision denying rehearing and rehearing *en banc* is reported at 598 F.3d 932. Pet. App. 66a. The final judgment of the district court is reported at 654 F. Supp. 2d 960. Pet. App. 42a.

JURISDICTION

The judgment below was entered on September 11, 2009. Pet. App. 1a. Petitions for rehearing and rehearing *en banc* were denied on December 14, 2009. Pet. App. 66a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The underlying facts of this case are undisputed. For two years, the NFL possessed scientific evidence that a seemingly innocuous, over-the-counter product called StarCaps contained an undisclosed,

potentially lethal controlled substance called Bumetanide. Bumetanide is on the NFL's list of prohibited substances, but nothing on the label or packaging of StarCaps indicates that Bumetanide is present in the product. Res. App. 4a at 22. Neither of the Williamses has ever taken steroids or performance enhancing drugs. Res. App. 2a-3a at 7, 16 .

The NFL knew since 2005 that NFL players were using StarCaps yet failed to disclose the health risk, or the risk that usage violated the NFL steroid policy, to players, including the Williamses, and then, starting in 2008, punished players for using that product without any notice or explanation. The NFL contends that it was defending its strict liability steroid policy by suspending the Williamses. Lower federal and state courts have all rejected the NFL's defense since it has been proved that the NFL had a "secret policy" not to suspend NFL players who tested positive for Bumetanide from as early as 2005 until sometime in 2008.

In July and August 2008, the Williamses and other NFL players tested positive for Bumetanide. Reversing years of policy — and playing what the Minnesota state trial court, after a bench trial, characterized as "a game of gotcha" — the NFL suspended the Williamses for four games without pay. Res. App. 21a at 154.

The NFL detected usage of StarCaps by invoking a drug testing procedure that indisputably and materially violated DATWA. The NFL's conduct also violated the clear public policy of Minnesota. Minnesota has a right to police the NFL's drug testing activity in Minnesota.

PROCEDURAL HISTORY

The NFL and the National Football League Players Association ("NFLPA") are party to a nationwide collective bargaining agreement ("CBA"), which incorporates the NFL Policy on Anabolic Steroids and Related Substances (the "Policy"). Pet. App. 115a–157a. The CBA affords players a right to appeal drug-related suspensions. That appeal was heard by NFL Vice President and General Counsel Jeff Pash on November 20, 2008. On December 2, 2008, Pash issued a decision upholding the suspensions. Pet. App. 77a-91a.

On December 3, 2008, the day after the NFL issued an arbitration decision suspending the Williamses for four games for their alleged violation of the NFL's Policy, the Williamses filed an action in District Court of the Fourth Judicial District of the State of Minnesota for the County of Hennepin and sought injunctive relief. Following extensive oral argument, a temporary restraining order against the NFL's suspensions was granted.

On December 4, 2008, the NFL removed the matter to the United States District Court for the District of Minnesota.[1] Following summary judgment

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[1] The Williamses originally sued the NFL and certain NFL representatives for fraud, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, violations of public policy, constructive fraud, negligent misrepresentation, negligence, gross negligence, vicarious liability under the doctrine of *respondeat superior*. Since the NFL removed the case to federal court the day after the Williamses' state court filing, the Williamses' amendment of the complaint to include

[Footnote continued on next page]

motions in federal court, Honorable Paul A. Magnuson, on May 22, 2009, ruled that the Williamses' common law claims were preempted by § 301 of the LMRA but that the DATWA and LCPA claims were not preempted. On May 22, 2009, the district court remanded the DATWA and LCPA claims to state court, declining to exercise supplemental jurisdiction over them because they raised significant questions about "the public policy of the state of Minnesota." Pet. App. 64a.

The United States Court of Appeals for the Eighth Circuit affirmed the district court in all respects. With regard to the DATWA claims, the court noted that "section 301 does not preempt state law claims merely because the parties involved are subject to a CBA and the events underlying the claim occurred on the job." Pet. App. 15a-16a. Because "a court would have no need to consult the Policy in order to resolve the players' DATWA claim," and because the NFL could "not point to a specific provision of the CBA or the Policy which must be interpreted," the court of appeals concluded that the Williamses' DATWA claims were not preempted by § 301. Pet. App. 19a, 22a. The NFL's petitions for rehearing and rehearing *en banc* were denied on December 14, 2009. Pet. App. 66a-77a.

[Footnote continued from previous page]
claims under DATWA and the LCPA, on January 2, 2009, occurred while the case was in federal court.

The state trial was held from March 8 through March 12, 2010.[2] The court issued findings of fact and conclusions of law on May 6, 2010, holding that the NFL had violated DATWA's three-day notice provision for notifying players of a positive test, but refusing to enjoin the NFL permanently from suspending the Williamses. Res. App. 1a-37a. The court concluded that "Kevin Williams and Pat Williams were not harmed by Defendant NFL's DATWA violation," and therefore "[p]laintiffs failed to establish success on the merits." Res. App. 23a, 36a.

On May 21, 2010, after the Williamses requested a stay of the order pending appeal, Judge Larson refused to dissolve the temporary restraining order pending appeal and stayed entry of the final order pending appeal of the order refusing to dissolve the injunction. Res. App. 38a-49a.

The Williamses appealed from the May 6, 2010 order to the Minnesota Court of Appeals on May 25, 2010. The briefing of that appeal was completed on

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[2] DATWA provides broad protections to Minnesota employees who are subject to employer drug and alcohol testing. It establishes, *inter alia*, criteria for testing laboratories, procedures employers must follow, and disciplinary limitations for those who test positive. Minn. Stat. §§ 952-955. The LCPA prohibits employers from disciplining employees because "the employee engages in or has engaged in the use or enjoyment of lawful consumable products" — products such as StarCaps — "if the use or enjoyment takes place off the premises of the employer during nonworking hours." Minn. Stat. § 181.938.

August 30, 2010. Oral argument is expected this fall and a decision shortly thereafter. Either party can seek discretionary review in the Supreme Court of Minnesota, but otherwise judgment on the Williamses' DATWA claims will be final in all respects unless one of the parties petitions for review by this Court.

After briefing before the Minnesota Court of Appeals was fully submitted, the NFL filed a motion to dismiss the appeal on September 8, 2010, asserting that the Williamses had not properly perfected an appeal from the trial court's final judgment. The NFL claimed, *inter alia*, that the appeal was moot and that there is no justiciable controversy to be heard before the court of appeals. Res. App. 50a-61a. That motion is pending before the Minnesota Court of Appeals.

REASONS FOR DENYING THE PETITION

I. THE PETITION MAY SOON BE MOOT.

The ongoing state court litigation may soon render the Petition moot.

The Minnesota state trial court has denied the Williamses the relief they seek, a permanent injunction on the merits of the state statutory claims. *See* Pet. 6 n.1, 17 n.3 (noting that the trial court "entered judgment for the NFL" on the DATWA claims and "granted summary judgment for the NFL on the LCPA claim"). The Williamses have appealed to the Minnesota Court of Appeals from the post-trial order relating to the DATWA claims. Appellate briefing in that case was completed on August 30, 2010, and a decision is expected within a few months. Because the Minnesota Supreme Court's

review is discretionary, and because that court typically decides whether to grant review within sixty days of a decision by the Minnesota Court of Appeals, the NFL may secure a final judgment on the DATWA claims well before the end of this Court's October Term 2010.

Moreover, the NFL recently moved the Minnesota Court of Appeals to dismiss the Williamses' appeal in the state system altogether. Res. App. 56a-68a. The NFL has taken the position that, while the Williamses timely appealed the Minnesota trial court's May 6, 2010 post-trial order setting out findings of fact and conclusions of law, and although the state court stayed entry of the trial order, the Williamses did not timely appeal the final judgment entered by an administrative clerk of the Minnesota trial court on June 7, 2010, notwithstanding the court's stay order. Accordingly, the NFL's current litigation position in the Minnesota Court of Appeals is that there presently exists an unappealed "final determination of the rights of the parties" with respect to these claims. Res. App. 51a. Should the NFL's motion be granted — it is fully briefed and pending adjudication — it is even more likely that the judgment in the state system will become final before this Court receives briefing, hears oral argument, and renders a decision on the merits.

A final state court decision in the NFL's favor on the DATWA claims would render the Petition for moot. It is elementary that this Court will not decide moot disputes. *Sec. and Exchange Comm'n v. Medical Comm. for Human Rights*, 404 U.S. 403, 407 (1972) ("Our lack of jurisdiction to review moot cases derives from the requirement of Article III of the

Constitution under which the exercise of judicial power depends upon the existence of a case or controversy") (internal quotation marks omitted). This Court will dismiss a writ of certiorari when a case becomes moot. *See Deakins v. Monaghan*, 484 U.S. 193, 199 (1988).

Although the mootness doctrine excepts the rare cases that are "capable of repetition, yet evading review," that exception applies only where "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 481 (1990). This exception does not apply here because "there is no reason to suppose that a subsequent case will not come with relative speed to this Court." *DeFunis v. Odegaard*, 416 U.S. 312, 319 (1974). The NFL has asserted and preserved its § 301 preemption defense in the state system, and, in the event the NFL does not prevail in the Minnesota appellate courts, it could obtain review by writ of certiorari via 28 U.S.C. § 1257(a).

Even if the NFL were correct in its assertion that there is a circuit split on the preemption issue — and, as discussed below, the NFL is wrong on this point — this Court can grant certiorari to resolve conflicts between the decisions of a highest state court and a federal court of appeals. *See, e.g.*, *Jones v. Flowers*, 547 U.S. 220 (2006) (granting certiorari to the Arkansas Supreme Court "to resolve a conflict among the Circuits and State Supreme Courts"); *United States v. Estate of Romani*, 523 U.S. 517, 521 (1998) (granting certiorari to the Pennsylvania Supreme Court where the decision of that court

"conflict[ed] with two federal Court of Appeals decisions"); *accord Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law"). As a result, the NFL could seek this Court's review were the Minnesota appellate courts to reverse the trial court and enter judgment against the NFL. Because the Petition may be rendered moot after a substantial expenditure of this Court's limited resources, certiorari is unwarranted.

II. THE COURT OF APPEALS LACKED JURISDICTION UNDER 28 U.S.C. § 1447(D).

The district court remanded the Williamses' state statutory claims to the Minnesota trial court. Under 28 U.S.C. § 1447(d), "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ." Under the plain text of that section, the court of appeals lacked jurisdiction, and this Court now lacks jurisdiction, to hear petitioner's appeal from the district court's order.

Beginning in *Thermtron*, this Court has permitted appellate review of remand orders in certain types of cases despite the plain language of § 1447(d). *See Osborn v. Haley*, 549 U.S. 225 (2007); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995). Although the plain language of § 1447(d) is unambiguous, *Thermtron* held that "remand orders *are* appealable if they are based on

any grounds *other* than the mandatory ground for remand set forth in § 1447(c)" because "subsections (c) and (d) are *in pari materia* and must be construed together." *Osborn*, 549 U.S. at 263 (Scalia, J., dissenting) (emphasis in original). Thus, *Thermtron* opened the door to appeals of remand orders based on grounds *other than* lack of subject matter jurisdiction, which is a mandatory ground for remand specified in § 1447(c).

Applying *Thermtron*, this Court recently determined that an appeal can be taken from a remand order in the circumstances here, where a federal district court declines to exercise supplemental jurisdiction over state law claims. *Carlsbad*, 129 S. Ct. at 1862.

Respondents believe that *Thermtron* was incorrectly decided, that this error infected the Court's decision in *Carlsbad*, and that the Eighth Circuit therefore lacked jurisdiction over the district court's remand order. As a result, respondents intend to request reversal of *Thermtron* should the Petition in this case be granted.

Several members of the Court have suggested that *Thermtron* was wrongly decided and that Justice Rehnquist's dissent in that case was a more faithful application of the statute and the intent of Congress. *See Carlsbad*, 129 S. Ct. at 1865 n.* ("We do not revisit today whether *Thermtron* was correctly decided. Neither the brief for petitioner nor the brief for respondents explicitly asked the Court to do so here . . . "); *id.* at 1861 ("Today, as in *Thermtron*, the Court holds that § 1447(d) does not mean what it says") (Stevens, J., concurring); *id.* ("*Thermtron* was questionable in its day and is ripe for reconsideration in the appropriate case") (Scalia, J., concurring).

The remand order here comes within the plain language of § 1447(d), but the order itself is not predicated on the absence of subject matter jurisdiction. Absent the *Thermtron* gloss, the district court's remand order would be unreviewable.

Thermtron conflicts with the policy judgment Congress made about the costs and benefits of remand appeals. "Congress' purpose in barring review of all remand orders has always been very clear — to prevent the additional delay which a removing party may achieve by seeking appellate reconsideration of an order of remand." *Themtron*, 423 U.S. at 354 (Rehnquist, J., dissenting). "While Congress felt that making available a federal forum in appropriate instances justifies some such interruption and delay, it obviously thought it equally important that when removal to a federal court is not warranted the case should be returned to the state court as expeditiously as possible." *Id.*

In cases where a respondent seeks to overturn this Court's prior jurisprudence, the Court has noted that "[w]e would normally expect notice of an intent...in the respondent's opposition to a petition for certiorari." *South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160, 171 (1999). Respondents provide such notice.

III. THE ISSUE ON WHICH THE NFL SEEKS REVIEW IS NOT PROPERLY PRESENTED

The Petition also should be denied because the question the NFL contends is presented relates only to the players' LCPA claims. The NFL prevailed in state court on the LCPA claims on summary judgment, and the players have not appealed from that ruling. No matter how the Minnesota Court of Appeals disposes of the Williamses' appeal on the

DATWA claims, the LCPA ruling for the NFL will be undisturbed.

The NFL's Petition focuses heavily on the DATWA claims while saying very little about the LCPA claims. But the Eighth Circuit dutifully evaluated every "defense" proffered by the NFL with respect to the DATWA claims. *See* Pet. 18-29. It only invoked the "no defenses" statement with respect to the LCPA claims — and the NFL has prevailed on those claims in state court in a ruling that has not been appealed.

Moreover, the NFL grossly exaggerates the significance of the Eighth Circuit's statement about the role of defenses in § 301 analysis. In rendering its LCPA analysis, the Eighth Circuit authored a single footnote, upon which the NFL essentially premises its entire challenge to the Eighth Circuit opinion, that "the NFL's defenses to liability under the LCPA are not relevant to our section 301 analysis." But it is evident from the 8th Circuit's analysis of both the LCPA and DATWA claims that the Court *did* look to all of the NFL's defenses on both claims.

The NFL asserted three arguments in support of its argument before the Eighth Circuit that DATWA was preempted by § 301 of the LMRA. Each of the arguments was considered and rejected by the Eighth Circuit.

The first argument was predicated on the language of DATWA itself which allows employers to test employees covered by a CBA for drugs only if that testing "meets or exceeds" DATWA's protections. The NFL claimed that that language required an analysis of the CBA in order to evaluate the testing performed on the Williamses and thus

preempted the claim. The Eighth Circuit rejected that claim: "DATWA does not state that an employee who is a party to such a CBA cannot bring a claim under DATWA. Rather, where there is a CBA that is at least as protective of employees as DATWA, the number of possible claims an employee has against his or her employer will be affected." Pet. App. 19a. The Eighth Circuit explained that a court does not need to consult the CBA or NFL's drug policy in order to resolve the Williamses' DATWA claim. *Id.* A court only needs to compare the procedure that the NFL actually followed with respect to the particular employee with DATWA's requirements in order to determine if an employee should prevail. *Id.* Such a claim, the Eighth Circuit found, was not preempted. *Id.*

The NFL's second argument for preemption was that DATWA provides a cause of action only against "employers," and an interpretation of the CBA was required to determine whether the NFL qualified as an employer. The Eighth Circuit rejected that argument, explaining that "[t]he NFL does not point to a specific provision of either the CBA or the Policy which must be interpreted." Only the relationship between the NFL and the Williamses needs to be analyzed to determine whether an employer-employee relationship existed. Pet. App. 22a.[3]

The NFL's third preemption argument was also considered and rejected. The NFL argued that

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[3] The state trial court did precisely what the Eighth Circuit suggested and found that an employee-employer relationship existed without reference to the CBA, by examining the NFL's role in the Williamses' employment.

denying preemption and subjecting its drug policy to divergent state regulation would render the uniform enforcement of its drug testing policy nearly impossible and compromise the integrity of its business. Pet. App. 23a. The Eighth Circuit rejected this argument, relying on this Court's holding in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 212 (1985) that in adopting § 301 Congress did not give "the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation." Pet. App. 24a. National companies operate in multiple states and have no difficulty complying with the laws of each state in which they do business. And to suggest that the Minnesota Vikings players would have a competitive advantage over another team's because their drug tests are analyzed quicker or in a more reliable fashion is simply fiction.

The Eighth Circuit also considered the NFL's defenses on the LCPA claims. As to those claims, the NFL's first argument was based on the alleged need to interpret the CBA to determine whether the NFL's ban on Bumetanide, the substance for which the Williamses tested positive, was a *bona fide* occupational requirement – an exception to liability under the LCPA. Pet. App. 25a. The second argument was premised on a limitation in the LCPA which applied its restrictions only to the use of substances "off the premises of the employer" and "during nonworking hours." *Id.* The NFL claimed that these provisions in the LCPA required a court to analyze the terms of the CBA to determine whether the CBA was applicable to the Williamses' claim under the LCPA. The Eighth Circuit noted that the NFL was unable to direct the court to any specific

provision of the CBA that had to be construed in order to determine what a *"bona fide"* occupational condition constituted or "off the premises of the employer" and "during working hours" meant. Pet. App. 28a. The Eighth Circuit went so far as to review the entire 361-page CBA "provision-by-provision" and found no guidance that could resolve what *"bona fide"* occupational condition or what "working hours" meant, and thus found that the CBA did not need to be interpreted to resolve the Williamses' LCPA claims.

The Eighth Circuit specifically considered what the NFL now contends that the Court ignored: the Court reviewed the claims, considered the NFL's contention that the CBA was intertwined with the claims and needed to be interpreted in order to resolve the action, and expressly rejected the NFL's contentions.

IV. THERE IS NO CONFLICT IN THE COURTS OF APPEALS WARRANTING THIS COURT'S REVIEW

In this matter, the Eighth Circuit followed well-established case law allowing union and non-union employees to enjoy the statutory protections traditionally provided by states. *See Livadas v. Bradshaw*, 512 U.S. 107, 123 (1994) ("§ 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law"); *Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1076 (9th Cir. 2005) (a CBA could not waive non-negotiable rights regarding employee meal times provided in a state statute and "Section 301 must not be construed to give employers and unions the power to displace state regulatory laws"); *Graham v. Contract Transp., Inc.*, 220 F.3d 910, 914 (8th Cir.

2000) ("It would be inconsistent with congressional intent under § 301 to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract") (citing *Allis-Chalmers*, 471 U.S. at 212).

The NFL contends that the courts of appeals are divided, but that is simply not so. The only two federal appellate decisions involving § 301 and state drug testing laws are the decision below and the Tenth Circuit's decision in *Karnes v. Boeing Co.*, 335 F.3d 1189 (10th Cir. 2003), both of which hold that § 301 does not preempt such statutes. Notably, the NFL's Petition singles out the Tenth Circuit as being in "conflict" with the Eighth Circuit (*see* Pet. at 9), but *Karnes* belies that assertion. Indeed, the Tenth Circuit case the NFL cites — *Fry v. Airline Pilots Ass'n*, 88 F.3d 831 (10th Cir. 1996) — does not even involve § 301. It involves the Railway Act. *See Fry*, 88 F.3d at 833. And the NFL's Petition does not cite or discuss *Karnes*. Similarly, the Seventh Circuit case cited by the NFL, *Smith v. Colgate-Palmolive*, 943 F.2d 764 (7th Cir. 1991), has nothing to do with state drug testing laws.

The NFL's other claims in support of the circuit conflict are equally strained. The NFL cherry picks stray language from the Ninth Circuit's decision in *Sprewell v. Golden State Warriors*, 266 F.3d 979 (9th Cir. 2001), that § 301 preemption "is not mandated simply because the defendant refers to the CBA in mounting a defense." *Id.* at 922. The Ninth Circuit in that case was addressing the NBA's claim that NBA players had waived certain state law rights by entering into a CBA with the league, a defense the Ninth Circuit stated could be sustained only if the "CBA includes clear and unmistakable language

waiving the . . . employees' state right." *Id.* Any fair reading of the Ninth Circuit opinion demonstrates that the court then in fact evaluated the CBA in the course of concluding that no such waiver existed. *See id.* ("The NBA and the Warriors have failed to cite *any* language, let alone clear and unmistakable language, in the CBA waiving Sprewell's state law right to assert intentional interference claims against the NBA and the Warriors") (quotation omitted). *Sprewell* does not stake out a position on the issue the NFL claims warrants this Court's review. There is no relevant conflict of law or controversy to warrant granting the Petition.

V. THE NFL CANNOT CONTRACT FOR WHAT IS ILLEGAL UNDER STATE LAW.

States, and in this case the State of Minnesota, have an inherent interest in their citizens' privacy rights and in protecting their citizens' health, safety and procedural rights. *Farmer v. United Bhd. of Carpenters and Joiners of Am., Local 25*, 430 U.S. 290, 303 (1977). DATWA regulates minimum rights concerning the health, well-being, and due process of Minnesota employees with regard to employer drug testing. The NFL challenges Minnesota's right to legislate these basic employee rights, seeking to place itself above Minnesota law and circumvent the basic minimum requirements imposed upon employers in the State. Yet, this Court has been unequivocal, "§ 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law." *Allis-Chalmers*, 471 U.S. at 212.

There is a strong presumption against preempting a state's legislation in the areas of the health and safety of its citizens. *Wyeth v. Levine*, No.

06-1249, 555 U.S. ___, 129 S. Ct. 1187 (Mar. 4, 2009); *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress"); *Lodge 76, Int'l Assoc. of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 137 (1976) (internal citations and quotations omitted) ("[i]n short, a State may still exercise historic powers over such traditionally local matters as public safety and order ... for policing of such conduct is left wholly to the states").

In *Farmer*, the Court considered a claim for intentional infliction of emotional distress brought by a union employee who voiced dissent regarding a union's operation. *Farmer*, 430 U.S. at 303. As a result of the employee's dissent, the union began to abuse and harass the employee by assigning him only to jobs of short duration or jobs for which he was not qualified. The union argued that federal labor law preempted the employee's intentional infliction of emotional distress claim.

The Court explained in *Farmer* that "inflexible application of the [preemption] doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." *Id.* at 302. The Court determined that *Farmer* presented a case with "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Id.* at 296-97. The Court noted that

states have a paramount interest in "protecting the health and well-being of its citizens." *Id.* at 303. Accordingly, "in light of the discrete concerns of the federal scheme and the state tort law, that potential for interference is insufficient to counterbalance the legitimate and substantial interest of the State in protecting its citizens." *Id.* at 304.

In *Metro. Life,* the Massachusetts Attorney General brought suit against an insurer to enforce a state statute which required that specified minimum mental health benefits be provided to Massachusetts residents. *Metro. Life,* 471 U.S. at 727. The insurer argued, in part, that the National Labor Relations Act preempted the state statute and deprived the state of the ability to legislate in the area of health benefits for employees. This Court soundly rejected the argument and held that the Massachusetts statute was a valid exercise of a state's historic police powers to protect the health and safety of its citizens by mandating minimum protections for employees. *Id.* at 756.

In two recent pronouncements, protecting states' regulations from preemption by federal schemes, this Court reaffirmed the presumption against preemption. *Cuomo v. Clearing House Assoc., L.L.C.*, 557 U.S. ___, 129 S. Ct. 2710 (2009); *Wyeth*, 129 S. Ct. at 1195. The *Wyeth* Court recognized the importance of not treating the issue of preemption lightly. *Wyeth*, 129 S. Ct. at 1195 n.3 ("We rely on the presumption [against preemption] because respect for the States as independent sovereigns in our federal system leads us to assume that Congress does not cavalierly pre-empt state-law causes of action") (internal quotations omitted).

Courts within the Eighth Circuit, most recently in this matter, have properly applied the *Farmer* limitation on preemption. *See, e.g., St. John v. Int'l Ass'n of Machinists and Aerospace Workers*, 139 F.3d 1214, 1219 (8th Cir. 1998) (preemption doctrine must yield in § 301 case in order to protect state's interest in addressing intentional infliction of emotional distress); *Ferrell v. Cross*, 557 N.W.2d 560, 566-567 (Minn. 1997) (intentional infliction of emotional distress claim and defamation claim can proceed).

Any argument that the NFLPA waived – or could have waived – the Williamses' rights by entering into the CBA fails as a matter of law. Private parties cannot contract away an employee's non-discretionary state law rights. The Supreme Court has held that as a general matter a union is authorized prospectively to waive only statutory rights related to collective activity, such as the right to strike, and cannot waive an employee's individual rights provided by statute. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974); *Neppl v. Signature Flight Support Corp.*, 234 F.Supp.2d 1016, 1020 (D.Minn. 2002) (noting that union representatives cannot waive an individual employees' statutory rights) (applying *Gardner-Denver*).

There can be no real debate that Minnesota has a *bona fide* interest in maintaining and enforcing minimum rights and protections for its employees from encroachments by employers on their privacy, due process, health and safety rights. Drug testing can be acutely intrusive and falsely labeling someone a drug user based on inaccurate or ill-confirmed tests can result in major and life-long harm to an individual. Minnesota exercised its inherent right to

protect its citizens and regulate inappropriate discharge or suspension of employees within the State based on infringing drug testing.

VI. CONGRESS DID NOT PREEMPT OR CREATE LAWS THAT CONFLICT WITH THE STATES' RIGHT TO REGULATE DRUG TESTING.

"The purpose of Congress is the ultimate touchstone" in a preemption analysis. *Metro. Life*, 471 U.S. at 736, quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963). That which is not specifically reserved for the federal government remains in the state's province. It is a fundamental principle of federalism that superseding state law and states' rights should not be done lightly. *Metro. Life*, 471 U.S. at 736.

Congress has historically been clear when it wants to preempt an area, including areas impacting sports organizations. For example, Congress explicitly created exceptions for sports organizations in the anti-trust arena. *Fed. Baseball Club v. Nat'l League*, 259 U.S. 200 (1922).

In the field of drug testing, Congress has legislated with regard to motor carriers, commercial transportation operators and railway operators. Federal Motor Carrier Safety Act, 49 C.F.R. Part 40, 382 (2000); Federal Railroad Administration, 49 C.F.R. Part 219 (2001); Drug-Free Workplace Act of 1988, 41 U.S.C. § 701 (1988). One year after Minnesota enacted DATWA, Congress enacted the Drug-Free Workplace Act of 1988, 41 U.S.C. § 701, requiring recipients of federal grants to maintain a drug-free workplace. Official regulatory guidance from the federal government states that the Drug-Free Workplace Act of 1988 is designed to "coexist

with State and local law." Government-wide Implementation of the Drug-Free Workplace Act of 1988, 55 Fed. Reg. 21,687 (1990). Thus, the federal government enacted legislation relating to drug testing that was designed to supplement, not supplant, State law.

Despite numerous congressional hearings on the use of steroids in professional sports, Congress has chosen not to regulate the field of sports drug testing.[4] As such, the area remains within the purview of the States for regulation. The NFL seeks to have this Court do what it could not successfully accomplish by lobbying the Legislative branch of government, exempt it from state drug testing laws.[5] Preemption should not be used to attain this goal. *Meyer v. Schnucks Markets, Inc.*, 163 F.3d 1048, 1051 (8th Cir. 1998)

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[4] Acknowledging that federal law does not preempt the right of states to regulate drug testing, United States Senator Byron Dorgan, on September 28, 2010, at the urging of the NFL, introduced federal legislation specifically designed to preempt the field of sports drug testing. The potential for congressional action in this area undercuts the need for this Court's review.

[5] On April 7, 2005, the Minnesota House Commerce and Financial Institutions Committee met to discuss the enactment of an amendment to DATWA that resulted in permitting random drug testing of professional athletes. When the floor opened up to Representative Goodwin, she specifically noted that the amendment would not affect or undermine the minimum protections for employees set forth in DATWA. Hearing on HF 1103 Before the H. Commerce and Financial Institutions Comm., 2005 Leg., 84th Sess. (Minn. 2005) (statement of Rep. Barbara Goodwin, Member, House Commerce and Financial Institutions Comm.).

VII. THE CLAIMS IN THIS CASE ARE NOT PREEMPTED BECAUSE THE COLLECTIVE BARGAINING AGREEMENT NEED NOT BE EXAMINED TO DETERMINE THE CLAIMS.

Section 301 of the LMRA is a jurisdictional statute under which "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties." 29 U.S.C. § 185(a). Section 301 was expanded to include a federal common law interpreting collective bargaining agreements. *Textile Workers Union v. Lincoln Mills*, 353 U.S 448, 451 (1957). This federal common law was deemed to preempt the use of state contract law to interpret collective bargaining agreements and enforcement. *Local 174, Teamsters of Am. V. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962).

Allis-Chalmers expanded the application of § 301 preemption beyond cases specifically alleging contract violations to those whose resolution "is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Allis-Chalmers*, 471 U.S. at 220. This Court reiterated that test for preemption in *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987). Acknowledging that "the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action for violation of contracts between an employer and a labor organization," the *Caterpillar* Court explained that § 301 preempts only "claims founded directly on rights created by collective-bargaining

agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.'" *Caterpillar*, 482 U.S. at 394 (1987)(*quoting Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983)(internal quotation marks omitted). *Caterpillar* specifically rejected the contention that "all employment-related matters involving unionized employees be resolved through collective bargaining and thus be governed by a federal common law created by § 301." *Id.* at 396 n. 10 (internal quotation marks omitted), explaining that employee claims unrelated to the terms of a CBA were not preempted.

In clarifying when claims are preempted under § 301, the Court in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988), held that states can provide substantive rights to workers irrespective of the existence of a CBA. *Id.* at 413. A state court suit seeking to vindicate these state law rights is preempted only if it "requires the interpretation of a collective-bargaining agreement." *Id.*

Lingle considered whether § 301 preempted an Illinois statute permitting an employee to file a claim for retaliatory discharge due to a collective bargaining provision which provided the employee with a contractual remedy for any termination without just cause. *Id.* The employee filed a claim with Illinois' Worker's Compensation Commission alleging a work related injury. *Id.* Thereafter, her employer terminated her for filing a false worker's compensation claim. *Id.* The employee went through the procedures outlined in the collective bargaining agreement and then sued, alleging that

her employer had violated the Illinois statute banning retaliatory terminations. *Id.*

The Court analyzed the elements of the Illinois statute and found that "[n]either of the elements requires a court to interpret any term of a collective-bargaining agreement." *Id.* at 407. "Thus, the 'state-law remedy in this case is 'independent' of the collective-bargaining agreement...for § 301 pre-emption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement." *Id.* Therefore, § 301 did not preempt the Illinois state claims.

In *Clark v. Kellogg Co.*, 205 F.3d 1079 (8th Cir. 2000), seasonal employees brought an action against their employer alleging breach of an oral contract to hire them permanently, promissory estoppel, fraudulent misrepresentation, and negligent misrepresentation. The employer claimed that § 301 preempted the breach of contract claim because the employer had an existing CBA with a union in which the employees were members.

Relying on *Lingle*, the Eighth Circuit in *Clark*, noted that "[w]hile Section 301 preempts claims founded directly on rights created by a CBA and claims substantially dependent on analysis of a CBA, not every dispute concerning employment or tangentially involving a provision of a CBA is preempted by Section 301." *Clark*, 205 F.3d at 1082. Because the *Clark* plaintiffs were not seeking to enforce any provision of the CBA, there was no preemption because the "state law claims neither originate in, nor refer in any substantial way to, the rights and duties established in the CBA." *Id.*

The Eighth Circuit has made a concerted effort to be "faithful to Supreme Court precedent" by

"requir[ing] that a claim be grounded on the rights established by a CBA, or substantially dependent on an analysis of a CBA, before it may be found to be preempted." *Graham*, 220 F.3d at 914 (no § 301 preemption where plaintiff claimed employer defamed him by terminating him as a result of a negative drug test and finding that the "defamation claim does not rely on any rights conferred by the CBA," but instead on "a right created by state law (namely, to be free from false and harmful statements made about him to others), which is a right that is independent of any CBA").

The Williamses' case needs no reference to or analysis of the CBA and is independent of it. The only relevant analysis involves an application of the NFL's actions to the confines of DATWA and a determination of whether those actions violated the Statute. The NFL's defense that it was merely complying with its CBA cannot insulate it from liability. Section 301 preemption is not applicable simply because a defendant without substance refers to the CBA in defending itself.

In *Humphrey v. Sequentia, Inc.*, 58 F.3d 1238 (8th Cir. 1995), an employee brought an action to restrain his employer from suspending him pending an investigation into the employee's conduct. *Id.* at 1239. The employer argued that § 301 preempted the employee's claims because the collective bargaining agreement specifically authorized the employee's claims. *Id.* The Eighth Circuit reversed. *Id.* Relying on Supreme Court precedent, the Court explained that "a *defendant* cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law" and

"[t]he fact that defendant argues...that there was 'just cause' under the terms of the CBA for the discipline plaintiff received, does not create a basis for § 301 preemption." *Humphrey*, 58 F.3d at 1244 (quoting *Caterpillar Inc.*, 482 U.S. at 399); *see also*, *Cramer v. Consol. Freightways, Inc.*, 255 F.3d 683, 692 (9th Cir. 2001) ("The plaintiff's claim is the touchstone for this analysis; the need to interpret the CBA must inhere in the nature of the plaintiff's claim. If the claim is plainly based on state law, § 301 preemption is not mandated simply because the defendant refers to the CBA in mounting a defense"); *Umphrey v. Fina Oil & Chemical Co.*, 921 F.Supp. 434, 437 (E.D.Tex. 1996) ("although the employers may defend against claims by arguing that their actions were authorized under the CBA and its rules, this fact does not transform the claim into one which requires an interpretation of the CBA"); *Brown v. Holiday Stationstores, Inc.*, 723 F. Supp. 396, 403 (D. Minn. 1989) (employer's claim that its conduct is authorized by a CBA is insufficient to warrant preemption). In *Humprey*, the claim was not preempted since the Court's decision was based upon a review of the facts and the statute, and no review of the CBA was involved – as in the Williamses' case.

The decision in *Karnes* is also instructive. *Karnes*, 335 F.3d at 1189. In *Karnes*, Boeing terminated the plaintiff, pursuant to the terms of a collective bargaining agreement and the anti-drug policy incorporated in the CBA, after the plaintiff tested positive for marijuana. The plaintiff argued that the employer's conduct violated Oklahoma's Drug Testing Act, 40, § 562(A), prohibiting termination based on a positive test result unless a second confirmatory test were performed. As a threshold matter, the Tenth Circuit determined that

the plaintiff's claim was not preempted for § 301 purposes because "[i]n order to establish a violation of this section, [the employee] must show that Boeing (1) discharged him based on his drug test, and (2) failed to confirm the result through a second test. Neither inquiry requires a court to interpret, or even refer to, the terms of a CBA." *Id.* at 1193. "Thus, [Plaintiff's] Drug Testing Act claims are clearly independent of the CBA and are not subject to § 301 preemption." *Id.* at 1194. The Tenth Circuit further held that the mere fact that the discharge may have been consistent with the anti-drug policy contained in the CBA "is irrelevant because '§ 301 does not grant the parties to a [CBA] the ability to contract for what is illegal under state law.'" *Id.* at 1994 (citing *Allis-Chalmers*, 471 U.S. at 212); *see also Thompson v. Hibbing Taconite Holding Co.*, No. 08-868 (JRT/RLE) 2008 WL 4737442, *4-5 (D. Minn. Oct. 24, 2008) ("[w]hether the employer violated its own testing policies is a separate question from whether it satisfied the requirements set forth in DATWA..." and holding that the "[a]llegations that [the employer] violated such non-negotiable state law rights do[es] not require an interpretation of the CBA, and would *not be preempted* under the LMRA") (emphasis added).

Like in *Karnes*, because resolution of the Williamses' DATWA claims does not require an interpretation of the CBA, the NFL's preemption claim fails.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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September 29, 2010

APPENDIX

APPENDIX

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Court File No. 27-CV-08-29778
Judge Gary Larson

STATE OF MINNESOTA
COUNTY OF HENNEPIN
DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Kevin Williams, Pat Williams,

Plaintiffs,

v.

National Football League,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT

The above-entitled matter came on for a court trial before the Honorable Gary Larson, Judge of Hennepin County District Court, on March 8, 2010 through March 12,2010. Kevin Williams and Pat Williams appeared personally and through their attorneys, Peter Ginsberg, Esq., Steven Rau, Esq., and Christina Burgos, Esq. The National Football League appeared by its attorneys, Joseph Schmitt, Esq., Daniel Nash, Esq., and Marla Axelrod, Esq.

The parties agreed to dismiss John Lombardo, M.D., and Brian Finkle, M.D., as Defendants. At the commencement of trial, Adolpho Birch was also dismissed from the action. Based upon on the files, records, testimony, and proceedings herein, the Court makes the following findings:

FINDINGS OF FACT

1 That the National Football League ("NFL") is an unincorporated nonprofit association comprised of 32 member clubs, including the Minnesota Vikings ("Vikings").

2 That the National Football League Management Council ("NFLMC") is the exclusive multi-employer bargaining representative for the NFL member clubs, including the Vikings.

3 That each member club is separately owned. Upon purchasing an NFL team, each owner agrees to be bound by the NFL Constitution and Bylaws and other agreed upon internal rules.

4. That Kevin Williams ("Kevin") plays football for the Vikings and has been in the NFL for seven years.

5. That Kevin's contract with the Vikings contains a weight bonus clause.

6. That Kevin is a starting player for the Vikings and has been selected to play in the Pro Bowl five times.

7. That Kevin has never taken steroids, performance enhancing drugs, or attempted to mask any banned substance.

8. That in 2006, Kevin had surgery on his left knee for a torn patella. Kevin found that maintaining a lighter weight helped him feel better.

9. That, shortly after his operation, in the start of the 2007 season, Kevin took Star Caps.

10. That a team mate initially told Kevin about and gave him Star Caps. Kevin subsequently purchased Star Caps from GNC stores or over the internet.

11. That Kevin took Star Caps for the perceived health benefits, to meet his contractual weight requirements, and to avoid his coach's reprimands for not meeting the weight requirements prescribed in his contract.

12. That Kevin never saw any notice or warnings about Balanced Health Products or Star Caps. Kevin would not have taken Star Caps if he had known that they contained the banned substance Bumetanide.

13. That Pat Williams ("Pat") plays football for the Vikings and has been in the NFL for thirteen years.

14. That Pat's contract with the Vikings contains a weight bonus clause.

15. That Pat is a starting player for the Vikings and has been selected to play in the Pro Bowl a number of times.

16. That Pat has never taken steroids, performance enhancing drugs, or attempted to mask any banned substance.

17. That Pat suffers from high blood pressure and gout, and takes medications for these conditions.

18. That, due to these health conditions, doctors advised Pat to maintain a specified weight.

19. That Pat first took Star Caps while playing for the Buffalo Bills to help alleviate the retention of extra fluid in his joints.

20. That Pat first heard about Star Caps from another player on the Buffalo Bills. Pat spoke with his trainer about taking Star Caps, and the trainer told him that it would be okay. He purchased Star Caps from GNC stores or over the internet.

21. That Pat never received any notice or warnings about Balanced Health Products or Star Caps. No one ever

advised Pat not to take Star Caps. Pat would not have taken Star Caps if he had known that they contained the banned substance Bumetanide.

22. That Pat reviewed the contents of the Star Caps bottle, which states that it is an all natural supplement and did not list any prohibitive substance. He also tried calling the players' hotline, but never received an answer.

23. That Kevin and Pat are both members of the NFL Players Association ("NFLPA"), the exclusive bargaining representative for all NFL players. Kevin and Pat have been NFLPA members since they began playing in the NFL.

24. That in 2006, the NFLPA and the NFLMC negotiated and entered into a comprehensive collective bargaining agreement ("CBA") that governs the terms and conditions of players' employment with members clubs and establishes procedures for discipline and dispute resolution.

25. That the CBA states that players are employed by a member club of the NFL.

26. That member clubs have agreed to resolutions, which govern their relationships with each other. The clubs agreed to share revenue from certain sources, such as television contracts and national marketing agreements.

27. That the national contracts are negotiated by a committee of owners, who must be approved by the member clubs. Revenue from these deals is administered by the NFL, on behalf of the member clubs, and maintained in an agency account.

28. That the revenue sharing provides, among other things, that clubs with higher revenues will share with clubs with lower revenues.

29. That the Vikings have sole authority to hire, fire, negotiate, and sign contracts with players, cut players, and provide special bonuses for players.

30. That the NFL reviews and approves every NFL contract for Vikings players and team personnel.

31. That Kevin and Pat entered into NFL player contracts which set forth the terms of their employment. The NFL standard form contract is collectively bargained and is included as Appendix C to the CBA.

32. That the contracts for Kevin and Pat are on the standard NFL mandated forms and were approved by the NFL.

33. That players may only use agents who are approved by and registered with the NFL to negotiate their contracts.

34. That Kevin and Pat's contracts state that they are employed by the Vikings as a "skilled football player," accept such employment, and agree to give their best efforts and loyalty to the club.

35. That the Vikings Vice President of Football Operations, Rob Brzezinski ("Brzezinski") negotiated specific contract terms with Kevin and his agent, Tom Condon ("Condon").

36. That, as part of the employment contract, the Vikings agreed to pay Kevin a yearly salary for his performance, services, and other promises. The contract also provides for individually negotiated bonuses paid by the Vikings to Kevin, and the payment terms of these bonuses.

37. That these bonus provisions are not part of the standard NFL contract, and must be approved by the NFL and the NFLPA.

38. That Kevin's contract includes a weight provision, negotiated by Brzezinski, under which Kevin could earn up to $400,000 in 2008, if he met certain required weight goals. Under this provision, Kevin specifically agreed not to engage in any last minute weight-reducing tactics such as excessive use of a steam room, use of diuretics, fasting, et cetera.

39. That Brzezinski negotiated a standard NFL contract with Pat and his agent, Angelo Wright ("Wright"). As part of this employment contract, the Vikings agreed to pay Pat a yearly salary for his performance, services, and other promises.

40. That Pat's contract includes a weight provision, negotiated by Brzezinski, under which Pat could earn up to $400,000 in 2008, if he met certain required weight goals. Under this provision, Pat specifically agreed not to engage in any last minute weight-reducing tactics such as excessive use of a steam room, use of diuretics, fasting, et cetera.

41. That many of the rules and regulations governing the NFL and the teams are collectively bargained for, including, post-season pay, retirement plans, college draft rules.

42. That, pursuant to the CBA, Kevin and Pat are entitled to receive various retirement benefits, including pensions. The retirement plans under the CBA are established and administered pursuant to the Taft-Hartley Act.

43. That the CBA establishes the amount of a player's pension, which is administered through the auspice of a separate pension fund. The specific amount of

retirement benefits payable to Kevin and Pat are controlled by the plan.

44. That the Vikings financial obligations for such benefits are controlled by the CBA. The benefits are the financial responsibility of the Vikings, not the NFL. The Vikings are required to make contributions to the plan for the benefit of Kevin and Pat during their employment. The Vikings' contributions to the retirement plan are paid out of the Vikings' share of the agency account maintained by the NFL.

45. That Pat and Kevin are paid directly by the Vikings with funds that the Vikings receive from many sources, including league-wide revenue sharing, supplemental revenue sharing, fees which the NFL receives from media and endorsement contracts, and other sources.

46. That the NFL negotiates and enters into all media and endorsement contracts on behalf of the teams. Fees from these contracts are paid into the revenue sharing program.

47. That the NFL maintains and manages an agency account where the shared funds are deposited. The NFL then distributes these from the agency account to the teams pursuant to a formula created by the NFL.

48. That the Vikings sell merchandise through retail outlets, the internet, and other arenas. The Vikings keep part of these proceeds and then turn a certain portion over to the NFL into the revenue sharing account. A portion of ticket sales for all home games are also turned over to the NFL for revenue sharing.

49. That the NFL also manages a separate supplemental revenue sharing program, where money is collected from higher revenue generating teams and distributed

to lower revenue generating teams. Teams may not opt out of this process.

50. That the Vikings, like all teams in the NFL, are required to participate in a revenue sharing program. The NFL Commissioner imposes discipline if a team fails to pool funds appropriately.

51. That without revenue sharing, the Vikings could not pay all of its salaries and business expenses.

52. That the NFL is a tax exempt not-for-profit corporation. Accordingly, the NFL loans funds to teams at a lower rate than a for-profit entity could normally borrow funds. Some teams are able to borrow funds for as low as 1%.

53. That the NFL avoids the unrelated business tax due to its tax structure.

54. That the NFL controls many areas of operation for the Vikings through the NFL owner's manual which dictates rules governing who can own and operate NFL teams and where they can operate, the operation of teams, salaries, *salary* caps, television, public relations, playing rules, publicity, revenue sharing, and discipline.

55. That the NFL commissioner may discipline individual players for violations of NFL rules, including imposing suspensions and/or fines.

56. That the NFL must approve a company before a player may contract with it for endorsement purposes.

57. That players can only wear NFL approved clothing on game days.

58. That the NFL also maintains a credit facility from which teams may borrow money.

59. That the NFL enforces a debt ceiling for all teams of $150 million. The amount each team has borrowed is known only to the NFL.

60. That the NFL determines a player's performance-based pay by looking at the player's salary, draft status, and playing time.

61. That the NFL controls, in immense detail, what players may wear during games including sock and chin strap color, the type of tape that may be used on shoes, how jerseys are tucked in, and even how a player may use a towel

62. That under the NFL's conduct policy, Vikings players are subject to discipline by the Commissioner if they violate an NFL policy.

63. That the CBA specifically provides the amount that players receive for playing in the Pro Bowl. Kevin and Pat have been selected to the Pro Bowl several times. The Vikings pay its Pro Bowl players with money given to them by the NFL.

64. That the Vikings have qualified for the playoffs during Kevin and Pat's tenure with them. The CBA provides the terms of the players' post-season pay. The NFL gives the Vikings money to pay its players for post-season play.

65. That the CBA establishes a policy on Anabolic Steroids and Related Substances (the "Policy").

66. That the Policy is designed to eliminate the use of performance-enhancing drugs in the NFL. The Policy articulates three goals: (1) protecting the fairness and integrity of professional football; (2) protecting players' health and safety, and; (3) insuring that NFL players do not send the wrong message to young fans,

whom may be tempted to use performance-enhancing drugs.

67. That the Policy, although negotiated by the NFLPA and NFLMC, is administered by the NFL through an Independent Administrator and Consulting Toxicologist.

68. That Dr. John Lombardo ("Lombardo") is the appointed Independent Administrator and Dr. Bryan Finkle ("Finkle") is the Consulting Toxicologist.

69. That Adolpho Birch ("Birch") is the NFL's Vice President of Law and Labor Policy and is the person at the NFL with the responsibility over the Policy and the liaison with the NFLPA.

70. That Stacy Robinson ("Robinson") is the NFLPA Director of Player Development, and he is Birch's counterpart for the NFLPA with responsibility over the Policy.

71. That, at all times relevant to this lawsuit, Finkle served as the Policy's Consulting Toxicologist and was appointed jointly by the NFLPA and the NFLMC. Finkle also consults for the U.S. Anti-Doping Agency, the World Anti-Doping Agency, the National Olympic Committee, the British Olympic Committee, the National Basketball Association, and the National Hockey League.

72. That, although Lombardo serves as the Policy's "Independent Administrator," Lombardo reports to and takes directives from Birch.

73. That, although the Policy provides that Lombardo has sole discretion to certify a positive test, which includes determining whether to grant therapeutic use exemptions and verify the chain-of-custody, this is not, in fact, how the Policy works.

74. That Birch specifically directed Lombardo how and when to report certain, specific types of positive tests.

75. That the Policy provides that the NFL, and specifically Birch, bear responsibility for imposing discipline in accordance with the Policy. The Policy also provides that the testing costs and compensation for Lombardo and Finkle are paid by the NFL.

76. That Kevin and Pat received a copy of the Policy each year at training camp. Both Kevin and Pat read, understood, and were familiar with the policy and the list of substances prohibited by the Policy.

77. That the Policy forbids players from having prohibited substances in their bodies. The prohibited substances are listed in Appendix A to the Policy. The list is negotiated between the NFL and the NFLPA and includes steroids and potential blocking and masking agents, such as diuretics that hinder the detection of banned substances.

78. That Bumetanide is one of the banned substances on the prohibited list. Bumetanide was included in the Policy's prohibited substances list at all times relevant to this lawsuit.

79. That the Policy provides that the unknowing use of a prohibited substance is not a defense to such use.

80. That the Policy also states that the use of a dietary supplement that contains a prohibited substance is not a viable excuse or a defense to the use thereof.

81. That the NFL has sent several letters to the players warning them not to use any dietary supplements because they often contain prohibited substances that are not listed on the packaging.

82. That the NFL also sent alerts for specific brands of products that should not be used.

83. That the NFL never sent an alert about Star Caps.

84. That the Policy provides that whoever tests positive for a prohibited substance is subject to a first-time minimum four-game suspension without pay, to be administered by the NFL (i.e. Birch).

85. That the Policy provides a detailed procedure for collecting specimens, protecting the chain-of-custody, reviewing test results, and maintaining confidentiality.

86. That the NFL was not aware of and did not take into consideration the laws of the State of Minnesota, and specifically the Drug and Alcohol Testing in the Workplace Act ("DATWA"), which governs drug test collection for Minnesota employees.

87. That the Policy provides that a specimen collector must observe the player furnish a urine sample, and then split the sample into "A" and "B" bottles and forward the samples to the appropriate lab for testing.

88. That the NFL uses two laboratories to conduct player drug tests, the UCLA Olympic Analytical Laboratory ("UCLA Lab") and the Sports Medicine Research and Testing Laboratory in Utah ("Utah Lab").

89. That the UCLA Lab and the Utah Lab are certified and accredited by the World Anti-Doping Agency ("WADA") and the International Organization for Standardization ("IOS").

90. That the UCLA Lab does not conform to the specific requirements of DATWA, but in all respects meets or exceeds the requirements for testing by laboratories as set out in DATWA.

91. That the Policy states that Lombardo may choose which laboratories to use.

92. That Lombardo testified that the UCLA lab is overworked and cannot possibly conduct player drug tests within three days, as required by DATWA.

93. That the NFL has an ownership interest in the Utah Lab and has a financial arrangement with the UCLA lab.

94. That the Policy requires that all NFL players be subject to annual drug tests as part of their pre-season physical examination during training camp.

95. That Kevin and Pat's urine samples were collected at the start of training camp, on July 26, 2008, pursuant to the Policy's annual pre-season testing provision, as noted in the NFL manual.

96. That Kevin and Pat observed the collectors split their specimens into "A" and "B" bottles and signed the chain-of-custody forms.

97. That Kevin and Pat's samples were sent to the UCLA Lab, which received them on July 28, 2008.

98. That the UCLA Lab completed an initial screening test on Kevin's "A" bottle on August 1, 2008. The lab then performed a confirmatory test on Kevin's "A" bottle sample beginning on August 6, 2008, and completing it on August 12, 2008. The results of the confirmatory test were certified on August 12 or 13, 2008.

99. That on August 13, 2008, the lab notified Lombardo of Kevin's initial positive screening and positive confirmatory test results.

100. That Lombardo then reviewed the chain-of-custody forms and scheduled a testing date for Kevin's "B" bottle sample.

101. That on August 27, 2008, Lombardo sent Kevin written notification of his positive test result. The letter was sent in an envelope marked "confidential." The letter was addressed to the Vikings and placed in Kevin's open locker.

102. That Lombardo's letter advised Kevin that his "B" bottle test would occur on September 9, 2008, and that he was entitled to have a qualified toxicologist observe the "B" bottle test.

103. That after receiving Lombardo's letter, Kevin told his wife; his agent Condon, and his coach, Brad Childress, about his positive test results.

104. That Condon informed his colleague Tracy Lartigue ("Lartigue") about Kevin's positive sample.

105. That on September 2, 2008, Lartigue sent Birch a letter appealing Kevin's positive test result. Lartigue copied Robinson in his letter.

106. That Kevin arranged for Dennis Crouch ("Crouch"), an independent toxicologist, to observe his "B" bottle test. Both Crouch and Finkle observed the "B" bottle test on September 9, 2008.

107. That the confirmatory "B" bottle test was positive for the presence of Bumetanide.

108. That Finkle reviewed the "B" test. On September 17, 2008, Finkle notified Lombardo, via e-mail, of his certification of Kevin's positive test result.

109. That Lombardo notified Lartigue, by phone, on September 22, 2008, that Kevin's final test was positive for Bumetanide.

110. That on September 22, 2008, Lombardo notified Birch, by mail, of Kevin's positive test result. This

was the NFL's first notice of Kevin's positive test result.

111. That Lombardo's September 22, 2008 letter was received by the NFL on September 24, 2008.

112. That, on September 26, 2008, Birch sent a letter by express mail, on behalf of the NFL, to Kevin and the Vikings notifying them that Kevin would be suspended for four games because he tested positive for a banned substance.

113. That, with regard to Kevin's drug test, the NFL did not comply with DATWA'S three-day notice requirement.

114. That Kevin testified at trial that he was not harmed because of Lombardo's or the NFL's delay in informing him of his positive test result.

115. That Kevin acknowledged that Bumetanide was in his system and does not challenge that he tested positive for Bumetanide.

116. That the UCLA Lab completed the initial testing screening on Pat's "A" bottle sample on August 1, 2008. The lab performed a confirmatory test on Pat's "A" bottle sample on August 6, 2008, and completed the analysis on August 12, 2008.

117. That the lab certified Pat's result as positive for the presence of Bumetanide. On August 13, 2008, the lab notified Lombardo of Pat' s positive test result.

118. That Lombardo requested the chain-of-custody documents for Pat's test. Lombardo conducted an initial review of all documents, and scheduled a date to conduct testing on Pat's "B" bottle sample.

119. That, on August 27, 2008, Lombardo sent Pat written notification of his positive results. The letter was in

an envelope marked "confidential" and was sent to the Vikings and placed in Pat's open locker.

120. That Lombardo scheduled Pat's "B" bottle test for September 9, 2008.

121. That shortly after receiving Lombardo's letter, Pat told his wife; his agent Wright; and his coach, Brad Childress, about his positive test result.

122. That Pat chose not to have an independent toxicologist observe his "B" Sample test.

123. That Pat's "B" bottle sample was certified as positive on September 10, 2008. On September 11, 2008, Lombardo was notified that Pat's "B" bottle showed the presence of Bumetanide.

124. That Finkle reviewed the documents and certified them to Lombardo on September 23, 2008.

125. That Lombardo reviewed the documents and certified the positive results to Birch on September 29, 2008. This was the first notice that the NFL received of Pat's positive test results.

126. That Lombardo's note was received by the NFL on October 1, 2008.

127. That on October 3, 2008, Birch sent the letter to Pat and to the Vikings notifying them that Pat would be suspended for four games because he tested positive for a banned substance.

128. That, with regard to Pat's drug test, the NFL did not comply with DATWA's three-day notice requirement.

129. That Pat testified that he was not harmed by either Lombardo's or the NFL's delay in informing him of his positive test results.

130. That Pat acknowledged that Bumetanide was in his system. Pat does not challenge the results showing that he tested positive for Bumetanide.

131. That on October 24, 2008, journalist Josina Anderson reported that a "highly-placed NFL source" released information that several NFL players tested positive for Bumetanide.

132. That on October 24 or 25, 2008, Jay Glazer, a news reporter, reported that Kevin and Pat tested positive for Bumetanide.

133. That Commissioner Roger Goodell was apparently not interested in discovering the source of the leak and did not request an investigation, on behalf of the NFL, to determine if anyone at the NFL was responsible for the leak.

134. That Birch testified that, in his opinion, reference by reporters to the NFL or League includes the NFL Football League, the NFLPA, players, agents, coaches, trainers, and team doctors. Birch defines the NFL as including all of these groups and individuals.

135. That Birch conducted a very brief investigation on his own concerning the leak. Birch concluded that no one from the NFL was involved in the leak., contrary to the newspaper reporter's assertion.

136. That Birch's single-handed investigation is highly suspect.

137. That Birch reached a totally unsupportable and unfounded conclusion, alleging that a certain individual outside of the NFL was the actual source of the leak.

138. That it is impossible for the Court to conclude by a preponderance of the evidence that any particular

individual was the source of the leak regarding Plaintiffs' positive test results.

139. That the Court finds that Kevin and Pat's attorney was not the source of the leak.

140. That Birch's contradictory testimony in this regard is not credible.

141. That in 2005 and 2006, Lombardo and Finkle became aware that a cluster of players' urine samples were testing positive for Bumetanide.

142. That Bumetanide is a very potent and dangerous drug and can cause serious side effects, including death, if inadvertently taken and not under the supervisions of a physician.

143. That Finkle became concerned because he had neither seen this drug nor its level of potency in previous tests.

144. That Finkle and Lombardo discussed their concerns regarding Bumetanide. After interviewing players who had taken Star Caps and subsequently tested positive, it became clear to them that Star Caps was creating the positive test results.

145. That because of the clear correlation between Bumetanide and Star Caps, Finkle and Lombardo requested that the Utah Lab performed a study on Star Caps. The study confirmed that Star Caps contained Bumetanide.

146. That it was obvious to Finkle that if a player took Star Caps, he would test positive for Bumetanide.

147. That Lombardo advised Birch that Star Caps contained the "secret" banned substance.

148. That Birch indicated that he would inform the FDA or another appropriate agency of this finding.

149. That Birch made a conscious decision not to inform the FDA or any other regulatory agency that Star Caps contained Bumetanide.

150. That Birch now knew that Star Caps contained Bumetanide and that NFL players were inadvertently ingesting Bumetanide.

151. That Birch made an affirmative decision to not disclose to the teams, the NFLPA, or the players, that Star Caps contained the banned substance Bumetanide and should not be used.

152. That prior to 2007, a number of players tested positive for Bumetanide and were not referred for discipline.

153. That Birch knew full well that players would continue taking Star Caps and testing positive for Bumetanide.

154. That Birch, thereafter, directed Lombardo to report any future players for discipline who tested positive for Bumetanide, even though their use thereof was inadvertent. Birch was playing a game of "gotcha."

155. That the NFL recently filed pleadings in *American Needle v. Nat'l Football League*, No. 08-661, 2009 WL 3865438 (2009), and argued before the United States Supreme Court that, contrary to its assertion in this case, the NFL should be treated as a single entity with the various member teams for anti-trust purposes.

156. That on December 3, 2008, Kevin and Pat filed suit against the NFL; the Policy's Independent Administrator, Lombardo; the Consulting Toxicologist, Finkle; and the NFL's Vice President of Law and Labor Policy, Birch. The complaint alleged a variety of common law torts based on Defendants' purported breach of their fiduciary duty to warn

players that Star Caps contained Bumetanide. Defendants removed the action to federal court on December 4, 2008.

157. That after this suit was removed to federal court, the suit was consolidated with a matter captioned *Nat'l Football League Players Ass'n v. Nat'l Football League and Nat'l Football League Management Council*, No. 08-CV -6254, 2009 WL 1457007 (D. Minn. May 22, 2009) (the "NFLPA Suit").

158. That the NFLPA Suit alleged claims on behalf of five NFL players, including Kevin and Pat, and sought to overturn the suspensions of those players on the grounds that their suspensions were the product of arbitrator bias, a public policy violation, and were inconsistent with the CBA. In support of the public policy claim, the NFLPA argued that the NFL failed to warn the players that Star Caps contained Bumetanide, in violation of state law fiduciary obligations. In support of its claim that the awards were inconsistent with the CBA, the NFLPA argued that the NFL had imposed harsher discipline on players who tested positive for diuretics in 2008 than it had imposed on players who tested positive for diuretics in 2006.

159. That Kevin and Pat filed a first amended complaint in federal court on January 2, 2009, which added counts under DATWA, Minn. Stat. § 181.950 *et seq.*, and the Lawful Consumable Products Act ("LCPA"), Minn. Stat. § 181.938.

160. That, on April 14, 2009, the parties in this case stipulated to dismiss Finkle as a party. On March 8, 2010, Plaintiffs dismissed, with prejudice, individual Defendants Birch and Lombardo.

161. That between January and April 2009, the parties engaged in expedited discovery followed by an accelerated summary judgment briefing schedule.

162. That following discovery, Defendants, Plaintiffs; and the NFLPA filed cross-motions for summary judgment in federal court.

163. That on May 22, 2009, the federal court denied Kevin and Pat's Motion for Summary Judgment and granted Defendants' summary judgment motion in part, holding that Plaintiffs' common law claims were preempted by section 301 of the Labor and Management Relations Act. *Nat'l Football League Players Ass'n v. Nat'l Football League*, 654. F. Supp. 2d 960, 967 (D. Minn. 2009). The Court held, however, that Plaintiffs' claims under DATWA and the LCPA were not preempted, and remanded those claims to this Court.

164. That the United States District Court rejected all of the common law claims asserted by Kevin and Pat, holding that those claims were preempted by Section 301 of the Labor Management Relations Act. *Nat'l Football League Players Ass'n*, 654 F. Supp. 2d at 967.

165. That the Court granted in full Defendants' Motion for Summary Judgment filed in the NFLPA Suit.

166. That in addressing the NFLPA's claims under Section 301 of the LMRA on their merits, the Court first reviewed the NFLPA's claim that the arbitration award upholding Plaintiffs' suspensions did not "draw its essence from the CBA." The Court rejected the NFLPA's claim that the suspensions were inconsistent with the CBA because several players in 2006 and 2007 had not been suspended for a positive

diuretic test. *Nat'l Football League Players Ass'n*, 654 F. Supp. 2d at 968.

167. That the Court addressed and dismissed the NFLPA's claim that the award violated public policy because it condoned a "breach of fiduciary duty." The Court rejected the argument about Lombardo's alleged failure to warn, concluding that "Lombardo's decision not to publish specific warnings about Star Caps does not violate his duties to players. Lombardo testified that he decided to send a general warning about weight-loss supplements rather than about Star Caps in particular because 'the problem is the whole area of weigh[t] reduction products.'" *Nat'l Football League Players Ass'n*, 654 F. Supp. 2d at 970. The Court therefore concluded that "Lombardo exercised his discretion under the Policy to educate players, and did so in a general way because he believed that all weigh[t]-reduction products, not just Star Caps, carried risks." *Id.* The Court, therefore, all claims related to Plaintiffs' failure to warn claim.

168. That the parties filed cross-appeals with the United States Court of Appeals for the Eighth Circuit, which affirmed the district court's decision in its entirety. *Williams v. Nat'l Football League*, 582 F.3d 863 (8th Cir. 2009). The Eighth Circuit held that Plaintiffs' statutory claims were not preempted because it could not identify "a specific provision of either the CBA or the Policy which must be interpreted." *Id.* at 877.

169. That on June 5, 2009, Plaintiffs attempted to file a second amended complaint in this case identifying the bases for their statutory claims, adding a new "retaliation" claim, and specifically alleging breaches of the collectively-bargained Policy.

170. That this Court held that Plaintiffs were not permitted to file the second amended complaint without leave of

Court, pursuant to a filed motion. Plaintiffs never submitted a Motion for Leave to File the Second Amended Complaint.

171. That the Court's summary judgment decision left only two of Plaintiffs' claims for resolution: (1) Plaintiffs' claim under the three-day notice provision of DATWA; and (2) Plaintiffs' claim under DATWA's confidentiality requirements and the collectively-bargained Policy on Anabolic Steroids and Related Substances.

ORDER

1. That Defendant NFL is Plaintiffs Kevin Williams and Pat Williams's employer for purposes of DATWA.
2. That Defendant NFL violated DATWA's three-day notice requirement.
3. That Plaintiffs Kevin Williams and Pat Williams were not harmed by Defendant NFL's DATWA violation.
4. That Plaintiffs Kevin Williams and Pat Williams failed to prove by a preponderance of the evidence that Defendant NFL's violated DATWA's confidentiality provision.
5. That Plaintiffs Kevin Williams and Pat Williams's request for a permanent injunction is denied.
6. That this Court's previous temporary injunction is dissolved.
7. That the attached memorandum is incorporated herein.

Let judgment be entered accordingly.

BY THE COURT

Dated: May 6, 2010

s / Gary Larson
Gary Larson
Judge of District Court

JUDGMENT

I hereby certify that the judgment contained in this Order herein above constitutes the Judgment of the Court.

Dated:

Court Administrator

By: Deputy Clerk

MEMORANDUM

I. LEGAL ANALYSIS

A. The NFL is Plaintiffs' Employer for Purposes of DATWA.

For purposes of DATWA, the NFL is Plaintiffs employer. DATWA governs only "'employer drug testing of employees." *Kise v. Product Design & Eng'g*, 453 N.W.2d 561, 563 (Minn. Ct. App. 1990). DATWA defines an employer as "a person or entity located or doing business in this state and having one or more employees, and includes the state and all political or other governmental subdivisions of the state." Minn. Stat. § 181.950, subd. 7. An employee is "a person, independent contractor, or person working for an independent contractor who performs services far compensation, in whatever form, from an employer." *Id.* subd. 6. Plaintiffs are indisputably employees of the NFL as well as the Vikings, for DATWA purposes.

The evidence adduced at trial shows that the NFL, along with the Minnesota Vikings, is a joint employer of Plaintiffs. The doctrine of joint employer status recognizes that a worker may have more than one employer. *See Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 66 (2d Cir. 2003) ("The regulations promulgated under the FLSA expressly recognize that a worker may be employed by more than one entity at the same time") (citing 29 C.F.R. § 791.2 (2003)); *Gargano v. Diocese of Rockville Ctr.*, 888 F.Supp. 1274, 1278 n.2 (E.D.N.Y. 1995) ("The concept of 'joint employer' most frequently arises in the context of claims asserted under the [NLRA], whether by individuals or the National Labor Relations Board"), *affd*, 402 80 F.3d 87 (2d Cir. 1996). Whether a person "'possesse[s] sufficient control over the work'" of employees to qualify as a joint employer "is essentially a factual issue." *International House v. NLRB*, 676 F.2d 906, 912 (2d Cir. 1982) quoting *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964)).

The NFL, not the Vikings, controls everything about the drug testing process for Minnesota employees including when the testing occurs, where it occurs, how often it occurs, who conduct the specimen collection, and which lab tests the sample. Moreover, the NFL's reach extends beyond drug testing to virtually every aspect of a player's employment, down to the uniforms the players are obligated to wear.

The NFL has significant control over the players' employment. *See Boire*, 376 U.S. 473 (determining joint employment under the National Labor Relations Act based on the "indicia of control" exercised by an employer); *Auto. Trade Ass'n of Maryland v. Harold Folk Enters., Inc.*, 484 A.2d 612 (1984) (finding joint employer status may be found where two or more businesses exercise some control over the work or working conditions of an employee). The Minnesota Supreme Court articulated a five-part test to determine whether an employment relationship exists: (1 the right to control the means and manner of performance; (2) the mode of payment: (3) the furnishing of material or tools; (4) he control of the premises where the work is done; and (5) the right of the employer to discharge. *Guhlke v. Roberts Truck Lines*, 128 N.W.2d 324 (Minn. 1964). The NFL is an employer under each part of this test.

1. The NFL Controls Plaintiffs' Means and Manner of Performance and the Location of Team Play.

The NFL directly and indirectly controls many aspects of a player's life both on and off the field. This control emanates from a series of formal rules and regulations existing both separate from and in conjunction with the CBA.

In *Boire v. Greyhound Corp.*, the Supreme Court indicated that a determination of joint employment, under the National Labor Relations Act, is based on the "indicia of control" exercised by an employer. 376 V.S. 473 (1964). There, the Court found that maintenance workers hired by an

independent contractor to clean a bus terminal were jointly employed by Greyhound, the bus company which owned the terminal. *Id.* The Supreme Court remanded the case for a factual evaluation of the control Greyhound exercised over the work of the maintenance employees. *Id.*

Subsequently, the Fifth Circuit Court of Appeals found that Greyhound was an employer of the maintenance workers because it exerted control over many aspects of the workers' employment. *N.L.R.B. v. Greyhound Corp.*, 368 F.2d 778 (5th Cir. 1966). The court looked to the following facts: (1) the employees constituted a homogeneous, readily identifiable and stable unit; (2) the service agreements gave Greyhound the right to establish work schedules, assign employees to perform work, specify the exact manner and means of accomplishing work, and to control regular and overtime wages; (3) employees used Greyhound's equipment and supplies in their work, and; (4) in the course of their duties, porters were given detailed supervision by other Greyhound personnel. *Id.* at 781.

Similarly, the NFL exerts control over many aspects of the players' employment. The NFL exerts some of its control over the means and manner of a player's performance by exercising control over the teams. The NFL directly regulates teams and team owners. For example, anyone buying into the NFL as a team owner must adhere to the rules and guidelines set forth in Policy Manual for Member Clubs, 2009 edition ("NFL Owner's Manual"). Any owner failing to abide by the NFL Owner's Manual faces punishment issued by the NFL. Like all prospective owners, the NFL required the Wilfs, the Vikings owners, to und ergo an extensive background check by the NFL before they were permitted to purchase the Vikings.

The NFL Owner's Manual also governs the manner in which the Vikings operate. It dictates rules governing team operations, salaries, mechanism of salary caps,

television contracts, public relations, playing rules, publicity, revenue sharing, and discipline. The NFL Commissioner has sole authority over such issues. The NFL maintains a strict hold over the contract process -refusing, for example, to approve contracts that do not use an NFL-mandated form or are not negotiated by registered agents. Before a player can sign on with a team, the NFL must review and approve his contract.

The NFL also controls where teams can operate. If the Vikings relocated, the Wilfs would be required to pay the NFL an excise tax. If an expansion team joined the NFL, it too would have to pay the NFL an excise tax. The NFL's control also extends to team playing schedules and locations. The NFL decides which teams will play against each other each week, when, where, and at what time the games will be played.

The NFL's level of control over the location, manner, and means of players' performance makes it appropriate to adjudicate it as an employer for DATWA purposes.

2. The NFL Controls the Mode of Payment to Plaintiffs.

The NFL argues that it should not be considered players' "employer" under DATWA because it does not issue a weekly paycheck to players. Nothing in DATWA requires such a restrictive reading. In fact, language defining "employee" suggests the contrary -DATWA specifically contemplates looking beyond the technicalities of how an employee is paid and instead focuses on "compensation, in whatever form." Minn. Stat. § 181.950(6).

The NFL negotiates for, collects, and apportions funds from which Plaintiffs and all other NFL players are paid. As stated earlier, the NFL's level of control over NFL teams is akin to that of a franchisor over a franchisee. The NFL is aware of the specific financial conditions of teams

requiring credit while individual teams do not know about other teams' finances. NFL teams must operate within the confines of rules and regulations imposed by the NFL. The NFL even identified the League as a franchise, and the teams as franchisees, in its 2000 IRS filing.

An additional sign of the degree of the NFL's control over teams is the NFL's avoidance of the unrelated business tax. Companies, such as Target and McDonalds, would be required to pay the unrelated business tax if one were to borrow from the other. Here, member teams are neither independent entities nor "unrelated" to the NFL in a corporate sense. Hence, member teams avoid the unrelated business tax when revenue filters to them from NFL bond transactions.

At the heart of the NFL's control is commercial control. The NFL even determines the companies with whom players can contract for endorsements. None of these enumerated control points, or others proved at trial, are dictated or addressed in the CBA. With a few exceptions involving pre-season play, the NFL negotiates and enters into all media contracts on behalf of the teams. The NFL has contracts with CBS, ESPN, Fox, and others. The NFL controls national sponsorships with companies such as Coca-Cola and Verizon. The NFL runs the NFL Network, the NFL website, NFL Film, and historical programming without any input from the teams or players. The NFL is the conduit from which revenue from those deals is distributed in order to fund teams and pay players.

The NFL also controls team finances as part of Revenue Sharing and Supplemental Revenue Sharing programs. All teams receive revenue sharing from the NFL. The revenue sharing comes from fees received by the NFL far, *inter alia*, media and endorsement contracts. The NFL maintains and manages an agency account where shared funds are deposited. The NFL then distributes these funds

from the agency account to teams pursuant to a formula created by the NFL. The teams are removed from the process and revenue pooling occurs automatically. To solidify the NFL's control over the process, the NFL Commissioner exercises discipline if a team fails to pool funds appropriately. Moreover, teams are not permitted to opt out of this process.

While NFL teams technically remit checks to players as compensation, some of these funds come from the NFL League Office. Part of players' salaries are paid for with funds from the NFL through the revenue sharing program. Player benefit plans, including pensions, tuition reimbursement, severance pay, and termination pay, are funded by NFL contracts and the NFL revenue stream. With regard to Plaintiffs, revenue sharing is particularly important. The Vikings could not pay its players' salaries and business expenses without the additional income it receives from revenue sharing.

The NFL controls the mode of payment to Plaintiffs because it controls and supplies many of the funds to the teams that the teams then pay Plaintiffs for the performance and services. The NFL meets the payment control prong of the *Guhlke* test.

3. The NFL Controls the Materials and Tools Used by Plaintiffs.

The NFL controls many of the materials and tools used by Plaintiffs in the course of their employment. The NFL acts as a franchisor of NFL teams controlling the rules that players must follow in order to play professional football. The NFL controls just about every aspect of Plaintiffs' workplace performance including what they wear, how they are permitted to act, and what football and non-football rules they must follow.

Moreover, the NFL furnishes and regulates the tools and materials with which players perform on the field. The NFL dictates step-by-step exactly what an NFL uniform must look like to pass as suitable attire. The NFL controls even minute details, such as the color of a player's chinstrap. The NFL's power over players' tools and materials may even override medical advice and/or treatment. For example, the NFL League Office has final approval, even if contrary to medical advice, on whether a player will he permitted to use tinted eye shields during a game. If a player chooses not to follow the rules imposed by the NFL, he faces fines or possible discharge. The NFL also meets the material and tools control prong of the *Guhlke* test for determining the identity of a worker's employer.

4. The NFL Controls the Right to Discipline and Discharge Plaintiffs.

The NFL's power to control is most evident in its ability to discipline and discharge players. The NFL's conduct policy applies to all NFL players and club employees. The NFL Commissioner is empowered to impose fines and subject NFL players and personnel, including coaches, referees and owners to non-monetary discipline as well. The NFL determines game-related misconduct including on-field infractions. NFL employee Merton Hanks enforces the uniform policy and the NFL collects fines for violations. The NFL also polices and punishes player conduct off of the field.[1] The NFL also

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[1] For example, Commissioner Goodell recently suspended Pittsburg Steelers Ben Roethlisberger for six games for violating the league's personal conduct policy, even though he was not charged with any crime. It is interesting to , note that a highly respected newspaper characterizes Roethlisberger's position as "an employee of the NFL." William C. Rhoden, Commissioner sends a message to rookie class, GLOBAL EDITION OF THE N.Y. TIMES, April 24-25, 2010, at Sports 13.

maintains the right to discharge players. For example, the NFL discharged Vikings player Bryan McKinnie from the 2009-2010 Pro Bowl Team. The NFL withheld McKinnie's Pro Bowl pay and required him to re-pay his Pro Bowl related expenses.

Finally, the NFL has the sole right to discipline players under the steroid Program. Although the Independent Administrator, in theory, has discretion whether to refer a player for discipline, Birch usurped Lombardo's authority in deciding who to refer for discipline. The NFL has ultimate authority to impose discipline under the program. Neither the Vikings nor any other team, is empowered to issue, prevent, or alter any discipline under the Program.

The NFL meets almost all of the criteria under *Guhlke*. The NFL has the right to contra I the means and manner of performance, the mode of payment, the furnishing of material or tools; exerts some control of the premises where the work is done, and has the right to discharge and discipline players. *Id.* Based on the *Guhlke* test established by the Minnesota Supreme Court, the NFL is a joint employer of Plaintiffs for DATWA purposes.

B. DATWA Applies to the NFL's Drug Testing in this Case.

DATWA applies to employers who conduct drug or alcohol testing. Minn. Stat. § 181.951. As established above, drug or alcohol testing is defined as an "analysis of a body component sample ... for the purpose of measuring the presence or absence of drugs, alcohol, or their metabolites in the sample tested." Minn. Stat. § 181.950(5). DATWA defines "drug" as a controlled substance as defined by Minn. Stat. § 152.01(4). Minnesota's controlled substance statute specifically includes "anabolic steroids," a substance for which the NFL tested players.

Minn. Stat. § 152.01 (4)(6). Minnesota law also states that a controlled substance includes drugs, which are defined as "as medicines and preparations recognized in the United State Pharmacopoeia or National Formulary and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either humans or other animals." Minn. Stat. § 152.01, subd. 2. Bumetanide is included in this definition. Drug testing for Bumetanide falls under the auspices of DATWA and applies to the NFL in this case.

DATWA covers the substances under the NFL's drug testing Policy. DATWA applies to the NFL and the drug testing at issue in this case.

C. Defendants Did Not Comply With DATWA's Three-Day Notice Requirement for Test Results.

Minnesota Statute § 181.953 subdivisions 3 and 7 provide that the "laboratory shall disclose to the employer a written test result report ... within three working days after a confirmatory test" and that the employer "[w]ithin three working days after receipt of a test result report from the testing laboratory ... shall inform in writing an employee ... of a positive test result on a confirmatory test." The lab did not disclose the confirmatory "B" sample test results to the NFL within three days and that the NFL did not disclose the results to Plaintiffs three days later.

Kevin and Pat were initially tested on July 26, 2008, but did not receive notice of the positive test results until September 26, 2008 and October 3, 2008, respectively. Dr. Lombardo stated that players generally receive notice of the initial test "anywhere from 14 days to 30 days, 35 days, sometimes longer," but that there is no time period by which he must inform players of a positive test result.

Lombardo reports to the NFL, is paid by the NFL, and takes direction from the NFL. Lombardo is an agent of

the NFL and received Plaintiffs' test results, in his capacity as an agent of the NFL. Lombardo received both Kevin and Pat's "*A*" sample test results on August] 3, 2008. Plaintiffs did not receive confirmation of their test results until late September and early October. Regardless of whether the NFL desired to give Plaintiffs' test results an additional level of review, they violated DATWA by not disclosing the confirmatory test results to Plaintiffs within three working days. This lapse in time violates DATWA's three-day notice requirement. The NFL's practice does not meet or exceed DATWA's three-day notice requirement.

Although, Defendants failed to comply with DATWA's three-day notification requirement, Plaintiffs testified that they did not suffer any harm as a result of the delay. When asked how he was harmed by any delay in notification, Kevin responded, "'I don't know, I wasn't." Similarly, Pat answered, "I guess I wasn't harmed." Because Plaintiffs did not suffer any damages as a result of the delay in notification, they are not entitled to relief under DATWA.

D. Plaintiffs Failed to Prove that the NFL Breached DATWA's Confidentiality Requirement.

Plaintiffs claim that the NFL breached the confidentiality requirement of DATWA. DATWA's confidentiality requirement states that "test result reports and other information acquired in the drug or alcohol testing process are ... private and confidential information, and ... may not be disclosed by an employer or laboratory to another employer or to a third-party individual, governmental agency, or private organization without the written consent of the employee or job applicant tested." Minn. Stat. § 181.954(2). Plaintiffs did not prove by a preponderance of the evidence that the NFL disclosed Plaintiffs' test results inappropriately.

Plaintiffs' stated, at trial, that they shared the results of their positive drug tests with others. Kevin told his wife, Vikings' Coach Brad Childress, his agent Candon, and his attorney. Coach Childress testified that he told Vikings Vice President of Football Operations Brzezinski. Condon told Lartigue, another agent in Condon's office. Kevin also told David Black and Dennis Crouch, two independent toxicologists. Kevin also stated that he may have told additional people, but "can't remember everybody on the list." Pat told his wife, his agent Wright, Kevin, and Coach Childress. Plaintiffs' coach, agents, and attorney, as well as Brzezinski all testified that they were not the source of the leak. Lartigue and Plaintiffs' wives did not testify. Because so many people outside of the NFL were informed of Plaintiffs' test results prior to the media reports, it is impossible for the Court to conclude by a preponderance of the evidence that the NFL must have violated DATWA's confidentiality provision.

The Court does conclude, however, that the media leak was clearly of no importance to the NFL Commissioner, as he did nothing to determine that the NFL did not violate DATWA's confidentiality provision. The Commissioner did not conduct an investigation or make any inquiries into the matter. Birch was likewise cavalier about the leak of highly-confidential information or potential violation of state law. Birch claimed to have conducted his own investigation into the leak at the NFL. However, Birch also claimed that the term "highly placed NFL source" that told the media about Plaintiff's test results could have referred to anyone even tangentially involved in the NFL, including players, agents, or coaches. Given Birch's definition, it is nothing short of miraculous that he could single-handedly launch a thorough investigation.

Plaintiffs' failed to support their allegations that the NFL leaked Plaintiffs' test results to the media with evidence. Plaintiffs failed to prove by a preponderance of the

evidence that the NFL breached DATWA's confidentiality requirement.

E. Plaintiffs' Request for a Permanent Injunction is Denied.

Plaintiffs seek an injunction, permanently enjoining the NFL from disciplining Plaintiffs as a result of the drug testing and subsequent discipline. DATWA provides that "[a]n employee ... has standing to bring an action for injunctive relief requesting the district court to enjoin an employer or laboratory that commits or proposes to commit an act in violation of sections 181.950 to 181.954." Minn. Stat. § 181.956 (3).

This Court has discretion to issue an injunction if Plaintiffs have proven their case on the merits. *Bio-Une, Inc. v. Burman*, 404 N.W.2d 318, 320 (Minn. Ct. App. J987). "In determining whether permanent injunctive relief is warranted, the district court must first determine whether the plaintiff has proven its case." *Thomas & Betts Corp. v. Leger*, No. A04-260, 2004 WL 2711391, at *25 (Minn. Ct. App. Nov. 24, 2004) (citing *Minn. Pub. Interest Research Group v. Butz*, 358 F. Supp 584, 625 (D. Minn. 1973), *aff'd*, 498 F.2d 13]4 (8th Cir. 1974)). If the court finds that a plaintiff has succeeded on the merits, it must then balance the likelihood of irreparable harm to the plaintiff against the possibility of injury to the defendant and other interested parties as well as any public policy considerations. *Id.*

Plaintiffs failed to establish success on the merits. The Court denies Plaintiffs' request for a permanent injunction and dissolves the temporary injunction that was put in place on December 3, 2008.

II. CONCLUSION

Based on Minnesota law and the facts adduced at trial, Defendant is Plaintiffs' employer for purposes of DATWA. Defendant violated DATWA's three-day notice

requirement. Defendant's drug testing notice policy did not meet or exceed DATWA. However, Plaintiffs admitted that they did not suffer any harm from the delay in notice. Plaintiffs, therefore, may not recover for Defendant's violation. Plaintiffs failed to prove that Defendant violated DATWA's confidentiality provision. Plaintiffs' request for a permanent injunction is denied and this Court's previous temporary injunction is dissolved.

Court File No. 27-CV-08-29778
Judge Gary Larson

STATE OF MINNESOTA
COUNTY OF HENNEPIN
DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Kevin Williams, Pat Williams,

Plaintiffs,

v.

National Football League,

Defendant.

ORDER AND MEMORANDUM OF LAW GRANTING PLAINTIFFS' MOTION TO STAY DISSOLUTION OF TEMPORARY INJUNCTION PENDING APPEAL

The above-entitled matter came for a hearing before the Honorable Gary Larson, Judge of Hennepin County District Court, on May 6, 2010. Steven Rau, Esq., Peter Ginsberg, Esq., and Christina Burgos, Esq., appeared for and on behalf of Plaintiffs, Kevin and Pat Williams. Joseph Schmitt, Esq., appeared for and on behalf of Defendants, the National Football League. Based upon all files, records, and proceedings herein, together with the arguments of counsel,

IT IS HEREBY ORDERED:

1. Plaintiffs Kevin Williams and Pat Williams" Motion to Stay Dissolution of Temporary Injunction Pending

Appeal is **PREMATURE AS THEY HAVE NOT YET FILED A NOTICE OF APPEAL.**

2. If Plaintiffs Williams and Pat Williams timely file a notice of appeal, the Court will grant their motion to stay the Findings of Fact, Conclusions of Law, and Order for Judgment of this Court dated May 6, 2010.

3. The order to stay dissolution of temporary injunction pending appeal will be conditioned upon Plaintiffs posting a supersedeas bond in the amount of $10,000.

4. The attached memorandum is incorporated herein.

BY THE COURT:

Dated: May 21, 2010

s / Gary Larson
Gary Larson
Judge of District Court
C-1655 Government Center
Minneapolis, MN 55487
(612) 348-6102

MEMORANDUM

I. Introduction

On May 6, 2010, this Court issued its Findings of Fact, Conclusions of Law, and Order for Judgment after the matter came before the Court for a trial March 8 - 12, 2010. The parties submitted post-trial briefs and the case was taken under advisement on April 2, 2010.

In its Order, the Court found that the National Football League, ("Defendant"), is Kevin Williams and Pat Williams', ("Plaintiffs"), employer for the purposes of the Drug and Alcohol in the Workplace Act ("DATWA"). The Court also found that Defendant violated DATWA by failing to abide by the Legislature's mandate that employees be given notice of a failed drug test within three days. However, the Court found that Plaintiffs were not damaged by Defendant's DATWA violation in delaying notice of Plaintiffs' positive test results. The Court denied Plaintiffs' request for a permanent injunction and dissolved its temporary injunction.

Plaintiffs have stated their intent to appeal this Court's decision and seek a reinstatement of the temporary injunction pending appeal. Plaintiffs have not, however, filed a notice of appeal or appeal. Plaintiffs instead filed a Motion to Stay Dissolution of Temporary Injunction Pending Appeal with this Court. Defendant opposes the motion.

II. LEGAL ANALYSIS

A. Standard of Review

The trial court may continue an injunction in effect pending appeal, notwithstanding the filing of cost and supersedeas bonds. *David N. Volkmann Const., Inc. v. Isaacs*, 428 N.W.2d 875, 876 (Minn. Ct. App. 1988) (citing *State v. Robnan. Inc.*, 107 N.W.2d 51, 53 (Minn. 1960)). If a stay is permitted, the trial court must establish and approve the

terms of security to protect the respondent. Minn. R. Civ. P. 62.02, 62.03; *see also* Minn. R. Civ. App. P. 108.01, subd. 1 (trial court must approve amount and form of supersedeas bond), 108.01, subd. 4 (on appeal from decision requiring assignment of documents, supersedeas bond may be waived if documents are deposited with officer appointed by trial court). *David N. Volkmann Const.*, 428 N.W.2d at 876.

According to Minnesota Rules of Civil Appellate Procedure Rule 108.02, subd. 1,

> A party seeking any of the following relief must move first in the trial court: (a) a stay of enforcement of the judgment or order of a trial court pending appeal; (b) approval of the form and amount of security, if any, to be provided in connection with such a stay; or (c) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending pursuant to Minn. R. Civ. P. 62.02.

Minnesota Rule of Civil Procedure 62.02 also provides for the granting of an injunction pending appeal. It states,

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

Minn. R. Civ. P. 62.02.

When determining whether or not to grant a stay pending appeal, the trial court must balance the appealing party's interest in preserving the status quo, so that effective relief will be available if the appeal succeeds, against the interests of the public or the prevailing party in enforcing the decision and ensuring that they remain "secure in victory"

while the appeal is pending. *DRJ, Inc. v. City of St. Paul*, 741 N.W.2d 141, 144 (Minn. Ct. App. 2007).

"The party seeking a stay pending appeal must show (1) that it is likely to succeed on the merits; (2) that it will suffer irreparable injury unless the stay is granted; (3) that no substantial harm will come to other interested parties; and (4) that the stay will do no harm to the public interest." *James River Flood Control Ass'n v. Watt*, 680 F.2d 543, 544 (8th Cir. 1982) (citation omitted); see *Arkansas Peace Ctr. v. Arkansas Dept. of Pollution Control*, 992 F.2d 145, 147 (8th Cir. 1993). "Thus, the factors considered in evaluating [defendant's] motion are virtually identical to those considered in assessing the initial motion for a preliminary injunction." *Metro Networks Commc'ns Ltd. P'ship v. Zavodnick*, No. Civ. 03-6198, 2004 WL 73591, at *3 (D. Minn. Jan. 15, 2004) (citing *United Healthcare Ins. Co. v. AdvancePCS*, Civ. No. 01-2320, 2002 WL 519720, at *1 (D. Minn. Mar. 22, 2002)).

Minnesota Rule of Civil Procedure 62.02 only applies when the party seeking a stay has filed an appeal. Plaintiffs' Motion to Stay Dissolution of Temporary Injunction Pending Appeal is premature because Plaintiffs have not yet filed an appeal or notice of appeal. However, when Plaintiffs file such an appeal, the Court will grant their motion based on the following analysis.

B. This Court may exercise its discretion to grant a stay.

In exercising its discretion to grant a stay of dissolution of the temporary restraining order, this Court must balance Plaintiffs' interests in preserving the status quo against Defendant's interest in enforcing discipline against Plaintiffs. The Court must determine if Plaintiffs are likely to succeed on the merits, will suffer irreparable injury unless the stay is granted, if substantial harm will come to other interested

parties, and whether the stay will harm the public interest. Each factor is discussed below.

1. Plaintiffs are likely to succeed on the merits.

Plaintiffs have a likelihood of success on the merits. Plaintiffs have the burden on appeal to prove that the trial court made an error of fact or law. *Graffius v. Control Data Corp.*, 447 N.W.2d 215, 216 (Minn. Ct. App. 1989). Typically, the likelihood of success on the merits is the most significant factor. *S & M Constructors, Inc. v. Foley Co.*, 959 F.2d 97, 98 (8th Cir. 1992). In order to satisfy the "likelihood of success" factor, the moving party does not have to establish "'absolute certainty of success,'" but only "that they are 'likely' to succeed on the merits." *Iowa Utils. Bd. v. F.C.C.*, 109 F.3d 418, 423 (8th Cir. 1996) (quoting *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986)). Further, to prove that it is likely to succeed on the merits on appeal, a party does not need to prove that there is a greater than fifty-percent chance that it will prevail on the merits. *Knutson v. AG Processing, Inc.*, 302 F.Supp.2d 1023, 1035 (N.D. Iowa 2004) (citing *Dataphase Sys. Inc. v. C L Sys. Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). "[A]t a minimum, the movant is required to show 'serious questions going to the merits.'" *Id.* (quoting *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985)).

The DATWA issues facing this Court were a matter of first impression. There is no case law that was able to guide this Court. It was assumed, throughout this case, that the Court's decision would be appealed by one or both parties. The Court found that Defendant violated Plaintiffs' rights under DATWA by failing to give notice of Plaintiffs' test results within three days. However, this Court also found that Plaintiffs were not harmed by Defendant's DATWA violation.

An employee, whose rights were violated under DATWA, is entitled to damages and other equitable relief, including ordering that the injured employee be reinstated. Minn. Stat. § 181.956. "In addition to any other remedies provided by law, an employer or laboratory that violates sections 181.950 to 181.954 is liable to an *employee or job applicant injured by the violation* in a civil action for any damages allowable at law." Minn. Stat. § 181.956 (emphasis added). The Court found that Plaintiffs were not injured by Defendant's violation based on Plaintiffs' own testimony.

Public policy, however, dictates that Defendant should not be permitted to benefit from its own misconduct. *See, e.g., Ganley Bros. v. Butler Bros. Bldg. Co.*, 212 N.W. 602, 603 (Minn. 1927) (refusing to enforce, based on public policy, a party's attempt to escape his own fraud); *Yates v. Hanna Min. Co., Inc.*, 365 N.W.2d 783, 787 (Minn. Ct. App. 1985) (finding that a contract which purported to delegate an employer's obligation to provide a safe environment for employees was ineffective to shield the employer from his own negligence). Here, Defendant knew Star Caps contained Bumetanide, that players were ingesting Bumetanide, that Bumetanide was dangerous, and withheld information about Star Caps, knowing that players would suffer as a result. Defendant created a trap that it knew would result in violations of the program.

Violations of public policy and violations of statutes are inextricably linked because statutes are one way in which states set forth their public policy. "Public policy, where the legislature has spoken, is what it has declared that policy to be. So far as the question of policy is concerned, [the] statute settles the matter." *Thompson v. Allstate Ins. Co.*, 412 N.W.2d 386, 388-89 (Minn. Ct. App. 1987). This case presents pressing issues of an important state law designed to protect employees. Guidance in the consistent application of DATWA is needed, and Plaintiffs' may prevail on appeal.

This Court has no delusions of grandeur and has had on previous occasions been reversed by the Court of Appeals and Supreme Court.

Regardless of Plaintiffs' likelihood of success on the merits, the Court must consider the other factors in granting a stay. "The court need not, however, address the merits of the parties' respective positions because the court finds that all three of the remaining factors weigh decisively in favor of [the stay]." *Twin Cities Galleries, LLC v. Media Arts Group, Inc.*, 431 F.Supp.2d 980, 983 (D. Minn. 2006) (citing Watt, 680 F.2d at 544). Because the other factors weigh heavily in Plaintiffs" favor, their likelihood of success on the merits is not determinative of whether the Court should stay the dissolution of the temporary restraining order.

2. Plaintiffs will suffer irreparable harm unless the stay is granted.

Plaintiffs will suffer irreparable harm if they are suspended before the appeal process is exhausted. The United States Supreme Court stated that a professional basketball player would suffer irreparable injury if he could not continue playing because a significant part of his career "will have been dissipated, his physical condition, skills and coordination will deteriorate from lack of high-level competition, his public acceptance as a super star will diminish to the detriment of his career, his self-esteem and pride will have been injured and a great injustice will be perpetrated on him." *Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204, 1205 (1971).

Courts have found that loss of NFL playing time is also sufficient to constitute irreparable harm. *See Jackson, et. al. v. Nat'l Football League*, 802 F.Supp. 226, 231 (D. Minn. 1992) (finding that "[t]he existence of irreparable injury is underscored by the undisputed brevity and precariousness of the players" careers in professional sports, particularly in the NFL"); *Bowman v. Natl'l Football League*, 402 F.Supp. 754,

756 (D. Minn. 1975) (stating that, without injunctive relief, a professional football player would "suffer irreparable harm, not compensable in terms of damages, and that the court's capacity to do justice will thereby be rendered futile"); *Denver Rockets v. All-Pro Mgmt.*, Inc., 325 F.Supp. 1049, 1057 (C.D. Cal. 1971) (stating that the professional basketball player will suffer greater harm than that of the NBA).

In this case, because the NFL playing season is relatively short, Plaintiffs would suffer a significant loss of playing time without the benefit of a stay. The loss of four games is considerable, given the relatively short season for professional football and the limited number of years remaining in Plaintiffs" football careers. Plaintiffs" ability to make the Pro Bowl and, ultimately have a fair opportunity for the Hall of Fame will be jeopardized if they are suspended. Moreover, Plaintiffs" reputations and standing in the community will be forever compromised.

The Court is satisfied that Plaintiffs would suffer irreparable harm absent a stay of the dissolution of the injunction.

3. No substantial harm will come to the NFL.

The NFL will not be substantially harmed by a stay of dissolution of the temporary restraining order pending appeal. Defendant argues that it will suffer irreparable harm. Defendant claims that granting a stay pending appeal would send the wrong message to young fans and skew the competition. Defendants also argue that a stay would pose a disadvantage to other players who attained their playing weight without using banned substances, as well as other teams whose players already served their suspensions for using Bumetanide or other prohibited substances.

Defendant could have easily avoided this very situation by informing players or teams about what it already knew – that Star Caps contained a hidden, dangerous substance. Defendant knew that many players were already inadvertently ingesting Bumetanide, and continued to place the health, safety, and welfare of its players in jeopardy, so that Adolpho Birch could play a game of gotcha. The league clearly allowed a half dozen other players to use Bumetanide without punishment. Granting a stay pending appeal would not cause Defendant irreparable harm, it would only affect Defendant's ability to immediately sanction Plaintiffs and would not affect the general enforceability its anti-doping policy. This Court finds that Defendant would suffer no harm by the continued imposition of an injunction during appeal.

4. Granting the stay will not harm public interest.

Granting a stay of dissolution of the temporary restraining order will benefit public interests. DATWA is a statute reflecting the public policy of the State of Minnesota. *Nat'l Football League Players Ass'n v. Nat'l Football League*, Civ. No. 08-6254, 2009 WL 1457007, at *10 (D. Minn. May 22, 2009). "Public policy, where the legislature has spoken, is what it has declared that policy to be. So far as the question of policy is concerned, [the] statute settles the matter." *Thompson v. Allstate Ins. Co.*, 412 N.W.2d 386, 388-89 (Minn. Ct. App. 1987).

Entering a stay pending appeal will allow the Minnesota Court of Appeals or the Supreme Court to review the case on the merits and ensure that the legislative will and public policy is served as best as possible.

The Court has balanced the factors under *DRJ*, 741 N.W.2d 141 and Watt, 680 F.2d 543. It is clear that Plaintiffs will suffer irreparable injury unless the stay is granted, that no substantial harm will come to Defendant, and that the stay will do no harm to the public interest. In sum, the Court

concludes that these factors clearly support granting Plaintiffs' Motion to Stay Dissolution of Temporary Injunction Pending Appeal. After Plaintiffs file a notice of appeal, the Court will grant their motion.

C. The stay is conditioned upon Plaintiff's posting a supersedeas bond.

The trial court has a large degree of discretion regarding the issuance of a stay and the conditions under which a stay is granted. *See, Matson v. Matson*, 310 N.W.2d 502 (Minn. 1981). The amount of security required for a stay is ultimately a matter for the Court's discretion. *See, e.g., No Power Line Inc., v. Minn. Envtl. Quality Council*, 262 N.W.2d 312, 331-32 (Minn. 1977) (explaining that an unsecured stay should be granted only in rare circumstances).

The Court, therefore, sets a supersedeas bond in the amount of $10,000. A stay of dissolution of the temporary injunction pending appeal will be entered and in effect until appellate review in this matter is exhausted. Plaintiffs are required to post a supersedeas bond in the amount of $10,000.

III. CONCLUSION

Plaintiffs have not yet filed an appeal or a notice of appeal. As such, their Motion to Stay Dissolution of Temporary Injunction Pending Appeal is premature. Assuming that Plaintiffs file an appeal, this Court has the discretion to grant a stay. Plaintiffs have shown some likelihood of success on the merits. More importantly, Plaintiffs have amply demonstrated that they would suffer irreparable injury unless the stay is granted, that Defendant will not be substantially harmed, and that the stay will not harm the public interest. Based on these factors, the stay of dissolution of the temporary injunction should be granted. After Plaintiffs file their notice of appeal and post a

supersedeas bond in the amount of $10,000, the Court will grant their motion.

No. A10-922

STATE OF MINNESOTA
IN COURT OF APPEALS

Kevin Williams and Pat Williams,

Appellants,

v.

National Football League,

Respondent.

THE NATIONAL FOOTBALL LEAGUE'S MOTION TO DISMISS THE APPEAL AS MOOT

TO: Clerk of Appellate Courts; Appellants above-named and their attorneys, Peter Ginsberg, Ginsberg & Burgos PLLC, 12 East 49th Street, 30th Floor, New York, NY 10017; and Steven Rau, Flynn, Gaskins, Bennett, LLP, 333 South 7th Street, Minneapolis, MN 55402

MOTION TO DISMISS THE APPEAL AS MOOT

Final judgment in this case was entered in favor of the National Football League ("NFL") on June 7, 2010, and the 60-day period for appealing that judgment has come and gone. Now that there is a "final determination of the rights of the parties" in this action, Minn. R. Civ. P. 54.01, "there is no injury that [this] [C]ourt can redress" in connection with the instant appeal from the district court's injunction order, *City of West St. Paul v. Krengel*, 748 N.W.2d 333, 338 (Minn. Ct. App. 2008). The NFL thus respectfully requests, pursuant to Rule 127 of the Minnesota Rules of Appellate Procedure, that this Court dismiss the above-captioned appeal and vacate the district court's stay order "for lack of justiciability." *Id.*

STATEMENT OF THE CASE

As discussed in full detail in the NFL's merits brief on appeal, this case is about two professional football players who admittedly violated the collectively-bargained Policy on Anabolic Steroids and Related Substances ("Policy") and were suspended as a result. The players subsequently brought suit against the NFL seeking compensatory damages, punitive damages, and injunctive relief. (A0019-38.)[2]

After a week-long trial, the court below concluded that Plaintiffs had "failed to establish success on the merits." (Add.027.) In its May 6, 2010 order, it dissolved its prior temporary injunction against Plaintiffs' suspensions; it refused Plaintiffs' request to enjoin their suspensions permanently; it denied Plaintiffs' request for an award of

[2] Citations appearing as Add.xxx are to the Appellants' Addendum; citations appearing as Axxxx are to the Appellants' Appendix; and citations appearing as RAxxxx are to the Respondent's Appendix.

money damages; and it ordered that judgment be entered for the NFL. (Add.015.)

On May 25, 2010, before the entry of final judgment, Plaintiffs appealed from the district court's injunction order alone. (A0397.) In their notice of appeal, Plaintiffs specifically indicated that they were relying on Rule 103.03(b) of the Minnesota Rules of Civil Appellate Procedure (*id.*), which allows an appeal from an order denying injunctive relief, Minn. R. Civ. App. P. 103.03(b). Plaintiffs then moved the district court to stay dissolution of the temporary injunction pending appeal, and the district court granted their motion. (A0369-0379.)

The district court entered final judgment on June 7, 2010. (RA0061.) In a June 23, 2010 order denying the NFL's motion to expedite, this Court recognized that the instant appeal "is taken only from the May 6, 2010 order denying injunctive relief. *The players have not perfected an appeal from a final judgment on the merits.*" (RA0053-0056 (emphasis added).) Plaintiffs had 60 days from the entry of final judgment – or until August 6, 2010 – to perfect such an appeal. Minn. R. Civ. App. P. 104.01; *see also T.A. Schifsky & Sons v. Bahr Constr. LLC*, 773 N.W.2d 783, 788 n.5 (Minn. 2009) ("The 60-day requirement is mandatory."). They never did.

ARGUMENT

I. PLAINTIFFS' APPEAL FROM THE INJUNCTION ORDER SHOULD BE DISMISSED FOR LACK OF JUSTICIABILITY.

"A case is moot if there is no justiciable controversy." *Krengel*, 748 N.W.2d at 338 (citing *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005)). "Generally, when an event occurs that makes . . . an award of effective relief impossible, the appeal should be dismissed as moot." *Mertins v. Comm'r of Natural Res.*, 755 N.W.2d 329, 334 (Minn. Ct. App. 2008)

(citing *In re Application of Minnegasco*, 565 N.W.2d 706, 710 (Minn. 1997)); *see also Krengel*, 748 N.W.2d at 338 (recognizing that because "[a]ppellate courts 'decide only actual controversies and avoid advisory opinions,' . . . when there is no injury that a court can redress, the case must be dismissed for lack of justiciability") (quoting *In re McCaskill*, 603 N.W.2d 326, 327 (Minn. 1999)).

The judgment against Plaintiffs on all of their claims represents a "*final determination of the rights of the parties*," Minn. R. Civ. P. 54.01 (emphasis added), and prevents Plaintiffs from obtaining permanent injunctive relief, which would have been available only if Plaintiffs had prevailed on the merits, *see, e.g.*, *Bio-Line, Inc. v. Burman*, 404 N.W.2d 318, 320 (Minn. Ct. App. 1987); *Thomas & Betts Corp. v. Leger*, No. A04-260, 2004 WL 2711391, at *25 (Minn. Ct. App., Nov. 24, 2004) ("In determining whether permanent injunctive relief is warranted, the district court must first determine whether the plaintiff has proven its case.") (Gray Aff., Ex. A). It would be "impossible" for this Court to issue "an award of effective relief" on appeal from the district court's order refusing to enjoin Plaintiffs' suspensions, *Mertins*, 755 N.W.2d at 334, given the trial court's unchallenged judgment against Plaintiffs on the merits of their claims.

To allow Plaintiffs to proceed with their efforts to permanently enjoin their suspensions also would undercut the "[p]ublic policy favor[ing] the finality of judgments and the ability of parties to rely on court orders." *Nussbaumer v. Fetrow*, 556 N.W.2d 595, 599 (Minn. Ct. App. 1996). The Minnesota Supreme Court has long held that a "judgment of a court of competent jurisdiction, after the expiration of the time of appeal, cannot be impeached." *Sache v. Wallace*, 112 N.W. 386, 387 (Minn. 1907); *see also Dieseth v. Calder Mfg. Co.*, 147 N.W.2d 100, 103 (Minn. 1966) (holding that even if a district court decision is wrong, it is still final after the time

for appeal has expired). A decision from this Court affording Plaintiffs relief from their suspensions in the face of a final judgment against them would do just that.

A. Minnesota Appellate Courts Have Repeatedly Granted Motions To Dismiss An Appeal Where, As Here, There Is An Unchallenged Final Judgment.

Minnesota appellate courts have consistently granted motions to dismiss an appeal from an order where, as here, the final judgment has not been appealed. In *Stockwalk Group, Inc. v. Taylor*, No. A06-1971, 2007 WL 2417153 (Minn. Ct. App., Aug. 28, 2007) (Gray Aff., Ex. B), for example, appellants challenged the district court's denial of their motion to temporarily enjoin respondents-attorneys from representing an adverse party in an arbitration matter. After that appeal was filed, an arbitration award was entered against appellants, "the decision went unchallenged, and the arbitration award [was] paid in full." *Id.* at *2. Respondents subsequently moved to dismiss the appeal from the injunction order and this Court granted the motion, holding that "mootness precludes our consideration" of the representation issues. *Id.* at *3.

The Minnesota Supreme Court's decision in *Sisto v. Housing and Redevelopment Authority of Duluth*, 104 N.W.2d 529 (Minn. 1960), is also on point. There, the district court denied plaintiffs' application for a temporary injunction and ordered plaintiffs to furnish a surety bond, providing that if no bond was filed the case would be dismissed with prejudice. *Id.* at 530. Plaintiffs appealed the order denying the injunction and the bond order, but never filed a surety bond. *Id.* After the case was dismissed with prejudice and final judgment had been entered against plaintiffs, the Supreme Court granted defendant's motion to dismiss the appeals from the injunction and the bond order because "all issues involved therein are now moot . . . . *there*

is nothing for us to review." *Id.* at 532 (emphasis added); *see also Sweeney v. Village of Ellsworth*, 159 N.W. 1067, 1068 (Minn. 1916) (holding that appeal from order striking pleading as sham and frivolous "presents a moot question only, because after the appeal was taken the case came on for trial in the court below, and was dismissed for want of prosecution"); *Breslaw v. Port Authority of St. Paul*, 135 N.W.2d 127, 127 (Minn. 1965) (granting respondent's motion to dismiss appellant's challenge to injunction order given that judgment had been entered and appellant failed to "appeal[] from the judgment within the time permitted").

Because here, as in those cases, there is "nothing for [this Court] to review" now that final judgment against Plaintiffs has been entered and the time for appealing that judgment has expired, *Sisto*, 104 N.W.2d at 532, this Court should dismiss Plaintiffs' appeal from the injunction order as moot.

B. None Of The Exceptions To The Mootness Doctrine Applies Here.

While an appeal will not be dismissed if "the issue raised is capable of repetition yet evading review," *Krengel*, 748 N.W.2d at 338, this case does not fit within that "narrow exception to the mootness rule," *Northern States Power Co. v. Minnesota Dep't of Transp.*, Nos. C0-01-1471, C5-01-1918, 2002 WL 555163, at *2 (Minn. Ct. App., Apr. 16, 2002) (Gray Aff., Ex. C); *see also Krengel*, 748 N.W.2d at 340 ("[W]e naturally hesitate to make an exception to mootness . . . ."). The "capable-of-repetition-yet-evading-review" exception applies only "if (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Krengel*, 748 N.W.2d at 339 (internal quotations and citations omitted).

The challenged injunction order in this case was *not* "too short to be fully litigated prior to its cessation or expiration," *Krengel*, 748 N.W.2d at 339 – in fact, the district court granted Plaintiffs' motion to stay the dissolution of the prior injunction against their suspensions pending appeal. The appeal from the injunction order would have been heard had Plaintiffs filed an appeal from the final judgment. Plaintiffs' failure to appeal the judgment is all the more remarkable because this Court in its June 23, 2010 order specifically alerted Plaintiffs to the fact that they had not yet "perfected an appeal from a final judgment on the merits." (RA0053-0056.)

In *Krengel*, by contrast, the court carved an exception to the mootness doctrine because the permanent injunction expired by its own terms before an appeal from the injunction could be heard. 748 N.W.2d at 339 (noting that the permanent injunction's nine-month lifespan was "too short to allow the judicial process to reach conclusion"). The *Krengel* plaintiff "was unable to obtain appellate review of the permanent injunction before it expired *despite having made three vigorous efforts to do so*." *Id.* at 340 (emphasis added). An exception is unwarranted here, where Plaintiffs had every ability "to obtain appellate review of the injunction order," but made *no* "efforts to do so." *Id.*

This also is not a case in which there is "a reasonable expectation that the same complaining party would be subjected to the same action again." *Krengel*, 748 N.W.2d at 339. There is no reason to expect that Pat and Kevin Williams would test positive a second time for a substance banned by the NFL Policy. Moreover, Pat Williams has stated that he is "seriously consider[ing]" retiring at the end

of this season, when his contract expires[3] – further diminishing the chance "that the same complaining party would be subjected to the same action again." *Krengel*, 748 N.W.2d at 339.

Finally, while this Court will "'decide issues that are technically moot when the issue is functionally justiciable and one of public importance and statewide significance,'" *State v. Matthews*, 779 N.W.2d 543, 548 (Minn. 2010) (quoting *Jasper v. Comm 'r of Pub. Safety*, 642 N.W.2d 435, 439 (Minn. 2002)), this Court already has decided that "[t]his appeal does not involve issues of statewide importance" (RA0055).

C. Plaintiffs' Rule 103.04 Argument Is Groundless.

In their Reply Brief, Plaintiffs rely on Rule 103.04 of the Minnesota Rules of Civil Appellate Procedure in arguing that this Court has jurisdiction over this appeal despite their failure to appeal the final judgment. (Appellants' Reply Brief, p. 10.) Plaintiffs' position is unavailing. While Rule 103.04 states that this Court may review any matter that "the interest of justice may require," language added to that rule in 1998 "suggests that *the rule should be read narrowly.*" *In re Welfare MR.*, No. C4-02-446, 2002 WL 31655025, at *8 (Minn. Ct. App., Nov. 26, 2002) (emphasis added) (declining to review whether judicial notice ruling was proper where appellant failed to object to ruling at trial) (Gray Aff., Ex. D). The added language provides:

> *The scope of review afforded may be affected by whether proper steps have been taken to preserve issues for review on appeal,*

---

3 *'Daaaaad' Pat Williams: 'We've got to win it this year'*, available at http://www.startribune.com/sports/vikings/102168439.html?elr=KArksi8cyaiU9PmP:QiUiD3aPc:_Yyc:aUU.

> *including the existence of timely and proper post-trial motions.*

Minn. R. Civ. App. P. 103.04 (emphasis added); *see also Swarthout v. Mutual Serv. Life Ins. Co.*, 632 N.W.2d 741, 747 n.2 (Minn. Ct. App. 2001) ("While [Rule 103.04] states that an appellate court may address any issue 'as the interests of justice requires[,]' the 1998 amendment to that rule requires consideration of whether 'proper steps have been taken to preserve issues for review on appeal.").

Here, where Plaintiffs neglected to appeal the final judgment even after this Court specifically advised them of their failure to do so, "proper steps" were *not* taken to "preserve issues for review on appeal." Minn. R. Civ. App. P. 103.04. Plaintiffs have cited no case – and the NFL is aware of none – in which a court declined on the basis of Rule 103.04 to dismiss an appeal that was otherwise moot.[4] In fact, recently in *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910 (Minn. 2009), the Minnesota Supreme Court held that notwithstanding Rule 103.04, the district court's denial of summary judgment was unreviewable "because the district court's decision at the summary judgment stage that there was a genuine dispute of fact becomes moot once the jury reaches a verdict on that issue." *Id.* at 918; *see also City of North Oaks v. Sarpal*, 784 N.W.2d 857, 861 (Minn. Ct. App. 2010) ("Although an appellate court has the authority to review orders that affect the judgment being appealed under Minn. R. Civ. App. P. 103.04, the denial of a motion for summary judgment . . . 'becomes moot once the jury reaches

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[4] While the *Matthews* court, citing Rule 103.04, exercised its discretion to address "'technically moot" issues "'of public importance and statewide significance,'" *Matthews*, 779 N.W.2d at 549 (quoting *Jasper*, 642 N.W.2d at 439), that well-recognized exception to the mootness doctrine, as discussed above, is inapplicable here.

a verdict on the issue.") (quoting *Bahr*, 766 N.W.2d at 918).[5] Thus, "[although the appeal statutes are liberally construed so that the right of appeal be not foreclosed, this court cannot assume jurisdiction where there is none." *Indep. Sch. Dist. No. 857 v. Seem*, 116 N.W.2d 395, 398 (Minn. 1962).

In the end, to allow Plaintiffs to go forward with their appeal would constitute a prohibited attack on a final judgment. *See Nussbaumer*, 556 N.W.2d at 599 ("Minnesota law does not permit the collateral attack on a judgment valid on its face."). Were Plaintiffs successful in obtaining a reversal of the district court order and an injunction against their suspensions, the judgment's "final determination of the rights of the parties," Minn. R. Civ. P. 54.01, would have no meaning – devastating the "ability of parties to rely on court orders," *Nussbaumer*, 556 N.W.2d at 599.[6] Minnesota's well-established rule that a "judgment of a court of competent jurisdiction, after the expiration of the time of appeal, cannot be impeached," *Sache*, 112 N.W. at 387,

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[5] Moreover, Rule 103.04 states that "[o]n appeal from or review of an *order* the appellate courts may review any *order* affecting the order from which the appeal is taken and on appeal from a *judgment* may review any *order* involving the merits or affecting the judgment." Minn. R. Civ. App. P. 103.04 (emphasis added). It does not, contrary to what Plaintiffs suggest, state that on appeal from an *order* an appellate court may review the *judgment* affecting the order from which the appeal is taken.

[6] Had Plaintiffs appealed the final judgment, the NFL might have adopted a different appellate strategy – possibly choosing, for example, to file a notice of related appeal to obtain review of the district court's earlier decisions in this case. *See* Minn. R. Civ. App. P. 106. While Plaintiffs in their Reply Brief fault the NFL for not having taken a "cross-appeal from the trial court's factual and legal finding that it violated DATWA" (Appellants' Reply Brief, p. 1), the NFL had no reason to appeal an unchallenged judgment in its favor.

prevents this Court from entertaining Plaintiffs' request for injunctive relief.

II. THE DISTRICT COURT'S STAY ORDER ALSO SHOULD BE VACATED ON THE SAME GROUNDS.

As discussed above, the unchallenged final judgment against Plaintiffs on all of their claims makes it impossible for them to obtain permanent injunctive relief on appeal. For all the same reasons, there no longer is any basis for the district court's decision to stay dissolution of the temporary injunction pending appeal. At bottom, Plaintiffs are entitled to neither temporary nor permanent relief from their suspensions now that there is a final judgment that they have "failed to establish success on the merits." (Add.027.)

See Bio-line, 404 N.W.2d at 320 (holding that plaintiffs could not obtain permanent injunctive relief because they had not established a "right to such relief" at trial); *Sanborn Mfg. Co. v. Currie*, 500 N.W.2d 161, 165 (Minn. Ct. App. 1993) (holding that temporary injunctive relief was unavailable to plaintiff who had "shown no likelihood it will win this case"). The district court's stay order thus should be vacated as well.

CONCLUSION

Because the final judgment against Plaintiffs bars them from obtaining "effective relief," *Mertins*, 755 N.W.2d at 334, the NFL respectfully requests that this Court dismiss the appeal from the district court's May 6, 2010 injunction order and vacate the district court's stay pending appeal.

DATED: September 8, 2010 Respectfully submitted,

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IN THE
Supreme Court of the United States

THE NATIONAL FOOTBALL LEAGUE,
Petitioner,

v.

KEVIN WILLIAMS AND PAT WILLIAMS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In harmony with the Ninth Circuit but in direct conflict with the Seventh and Tenth Circuits, the Eighth Circuit held that defenses based on a collective bargaining agreement are irrelevant to whether state law claims originally brought in federal court are preempted under Section 301 of the Labor Management Relations Act ("LMRA"). Respondents largely ignore this conflict, relying instead on cases that are inapt or reinforce the conflict in the circuits. Beyond that, respondents' efforts to backhand the disruption to the law caused by the court of appeals' decision never comes to grips with the central importance of uniformity in the enforcement of collective bargaining agreements and arbitration awards issued to enforce their terms.

In this case, the Eighth Circuit's decision has allowed state-law claims to hijack for more than a year the enforcement of a lawful arbitration award issued under Section 301 that actually was *affirmed by the court of appeals* and, in the process, to unravel deliberately strict, collectively-bargained protections against the use of prohibited substances in professional sports.

I. THE EIGHTH CIRCUIT'S DECISION EXPANDS AN ENTRENCHED CONFLICT IN THE CIRCUITS AND CONTRAVENES THIS COURT'S PRECEDENT.

As the petition explains and four Circuit Judges below recognized, the root cause of the split in the circuits is the failure of the Eighth and Ninth Circuits, in contrast with the Seventh and Tenth Circuits, to enforce the fundamental distinction that this Court has drawn in Section 301 cases between

the jurisdictional doctrine of complete preemption and the substantive doctrine of ordinary preemption.

Complete preemption is a jurisdictional inquiry that addresses the removability to federal court of state law claims originally brought in state court. Because it is the plaintiff's complaint that controls this inquiry, removal may not be based on defenses asserted under the collective bargaining agreement. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 396-399 (1987).

Ordinary preemption applies when removability and jurisdiction are not in question, *i.e.*, to cases involving state law claims that already have been remanded to state court or (as here) were originally brought in federal court. In such cases, the Section 301 preemption analysis goes beyond the jurisdictional inquiry of the complete preemption doctrine and determines the ultimate question of substantive preemption on the merits. For that inquiry, defenses based on a collective bargaining agreement may be considered in determining if the state-law claims are preempted. *Caterpillar*, 482 U.S. at 398 n.13 (defenses relevant to preemption of remanded claims); *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399, 402, 407 (1988) (defenses relevant to preemption of state law claims brought in federal court).

A. As noted in the petition (at 9-10), the Seventh and Tenth Circuits have hewed to this Court's direction in *Caterpillar* and *Lingle* and held that defenses based on a collective bargaining agreement are relevant to Section 301 preemption of state law

claims originally brought in federal court. *Smith v. Colgate-Palmolive Co.*, 943 F.2d 764, 769-771 (7th Cir. 1991); *Fry v. Airline Pilots Ass'n*, 88 F.3d 831, 838 & n.8 (10th Cir. 1996).

Respondents' effort (BIO 16) to distinguish *Fry* on the ground that it arises under the Railway Labor Act ("RLA") fails. This Court held in *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 259 (1994), that the preemption inquiry under the RLA mirrors Section 301 analysis. And consistent with *Norris*, the Tenth Circuit in *Fry* applied the Section 301 framework in determining whether state law claims brought in federal court were preempted by the RLA.

In contrast to the Seventh and Tenth Circuits, a divided Eighth Circuit here conflated complete and ordinary preemption. In so doing, the Eighth Circuit tracked the law in the Ninth Circuit, which also has held that defenses based on a collective bargaining agreement are irrelevant to the preemption of state law claims originally brought in federal court. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 991 (9th Cir. 2001). Respondents contend that *Sprewell* did not "stake out a position on the issue. . . ." BIO 17. But that defies a plain reading of *Sprewell*. Even though the plaintiff's state law claims were brought in federal court in the first instance, thus making *Sprewell* an ordinary preemption case, the Ninth Circuit applied complete preemption principles, stating unequivocally that "any attempt by [defendants] to pull Sprewell's . . . claims in to the preemptive scope of section 301 *by mounting a defense in reliance on the [collective bargaining agreement] would be fruitless.*" *Sprewell*, 266 F.3d at

991 (emphasis added). To support that misplaced proposition, the Ninth Circuit relied on an earlier complete preemption case in which removability jurisdiction was at issue and held that "'the need to interpret the [collective bargaining agreement] must inhere in the nature of the plaintiff's claim.'" *Id.* (quoting *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d. 683, 692 (9th Cir. 2001) (en banc)). *See also Cramer*, 255 F.3d at 688 (noting removability issue).[1]

Respondents' reliance (BIO 16) on *Karnes v. Boeing Co.*, 335 F.3d 1189 (10th Cir. 2003), demonstrates that they share the Eighth and Ninth Circuits' confusion. *Karnes* was a complete preemption case. The claims under the state drug-testing statute were originally brought in state court, and the defendant sought to remove the case to federal court under Section 301 on the basis of drug-testing provisions in a collective bargaining agreement. *Id.* at 1192. For that reason, the Tenth Circuit held that it must look solely to plaintiff's

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[1] Respondents wrongly assert (BIO 17-18) that the Ninth Circuit in *Sprewell* considered defenses as part of its preemption analysis. The Ninth Circuit merely posited that, even if the defendants in that case had argued that the collective bargaining agreement implicitly waived the plaintiff's claims, those claims would not be waived because the waiver was not express. 266 F.3d at 992. The Ninth Circuit's musings in dicta about the waiver of nonpreempted state law claims have nothing to do with whether collective bargaining agreement-based defenses should be factored into the preemption analysis, as this Court recognized in *Lingle*. *See* 486 U.S. at 409 n.9 (distinguishing between waiver of non-preempted state statutory rights and the preemption of those rights).

complaint in determining whether the case should be removed under Section 301. *Id.* at 1193.

B. Unable to escape the depth and breadth of the conflict in the courts, respondents wrongly argue (BIO 11-12) that the issue is not properly presented here. Respondents' assertion stems from the mere fact that the Eighth Circuit situated its holding that defenses are irrelevant to Section 301 preemption in its discussion of respondents' Lawful Consumable Products Act ("LCPA") claim, which is no longer in the case, and not in its discussion of the Drug Testing in the Workplace Act ("DATWA") claim, which remains in controversy. But the Eighth Circuit's categorical holding that defenses are irrelevant to Section 301 preemption analysis was not in any way dependent on the nature of the LCPA claim, which the dissenting judges below recognized. *See* Pet. App. 70a ("In holding that the claims are not preempted, the panel reasoned that the NFL's defenses to liability *under Minnesota law* must not be considered in determining whether the state-law claims are 'substantially dependent upon analysis' of a collective bargaining agreement, *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985), and thus preempted by § 301.") (emphasis added). Nor could it be. The role of defenses in Section 301 preemption is a question of federal law, not an issue that varies from one state-law claim to another.[2]

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[2] Respondents' contention (BIO 9-10) that this Court should deny the petition on the grounds that the Eighth Circuit lacked jurisdiction following the district court's remand of the case defies controlling precedent decided just last year. *See Carlsbad*

II. THE EIGHTH CIRCUIT'S DECISION PREVENTS THE UNIFORM ADMINISTRATION OF COLLECTIVE BARGAINING AGREEMENTS AND ARBITRAL AWARDS.

The foundational purpose of Section 301 preemption is ensuring uniformity in the administration of collective bargaining agreements, which is indispensable to Congress's intent that collective bargaining be the central mechanism for resolution of labor-management disputes. *Lingle*, 486 U.S. at 406. Like the Ninth Circuit in *Sprewell*, the Eighth Circuit's decision in this case makes such uniformity impossible and, in fact, openly invites the use of state-law claims to impair and impede the enforcement of collective bargaining agreements and their arbitration awards, even when, as here, an arbitration award has been upheld as lawful. The decision further empowers state courts to impose conflicting interpretations of the same collective bargaining agreement based on the limitless variability of state laws.

That is precisely what happened here. An arbitration award issued pursuant to the express and unambiguous terms of the Collective Bargaining Agreement ("CBA") between the NFL and the NFL Players Association upheld the suspensions of respondents, who play for the Minnesota Vikings, and three New Orleans Saints players for violating the CBA's Policy on Anabolic Steroids and Related

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Tech., Inc. v. HIF Bio, Inc., 129 S. Ct. 1862 (2009); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976).

Substances ("Policy"). Pet. App. 2a-4a. But after the Eighth Circuit's "defenses are irrelevant" remand, respondents secured a Minnesota state court injunction against enforcement of the arbitrator's award. Pet. 16. The result was one rule (no suspensions for violating the Policy) for respondents and players in Minnesota and a different rule (suspensions for violating the Policy) for players in Louisiana and other states. That checkerboard administration of collective bargaining agreements is exactly what Section 301 is intended to prevent. *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962).

Respondents make no effort to deny these profound problems but instead offer arguments that do not withstand scrutiny.

First, respondents attempt (BIO 17) to pass off their use of state law to trump arbitral decisions under Section 301 as par for the jurisprudential course. But their argument depends largely on wrenching out of context this Court's statement in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985), that "§ 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law." In the very next sentence, the Court made clear that it was referring only to claims under state law that are "independent of a labor contract" -- that is, claims that, unlike here, are not preempted because their resolution does not require interpretation of a collective bargaining agreement. *Id.*

Moreover, respondents ignore that any challenge to the legality of the arbitration award was required to be made under the LMRA's "narrow" exception that allows federal courts to vacate arbitrator rulings only when they "run contrary to an explicit, well-defined, and dominant public policy." *Eastern Assoc. Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 63 (2000). The NFL Players Association challenged the award on those grounds. The court of appeals rejected that challenge and confirmed the award. Pet. App. 38a-39a. But in allowing respondents' separate challenge to proceed in state court, the court of appeals' ruling licensed a state judge to enjoin under state law the very award that the court of appeals had upheld under the LMRA as consistent with public policy. Respondents fail to confront that fundamental incoherence in the court of appeals' decision.[3]

Second, respondents fare no better with their citation to non-LMRA decisions for the proposition that "there is a strong presumption against preempting a state's legislation in the areas of the health and safety of its citizens." BIO 17. The LMRA recognizes no such "presumption," as confirmed by this Court's decision in *Lingle*. There, the Court applied ordinary Section 301 preemption principles

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[3] Respondents also contend that the NFL and the NFL Players' Association could not have waived through a collective bargaining agreement respondents' rights under DATWA. BIO 20. That is irrelevant because the NFL is not arguing that respondents' DATWA rights are waived. The NFL is arguing that the DATWA claims are preempted. That is very different. *See Lingle*, 486 U.S. at 409 n.9.

despite Illinois' strong public policy in favor of protecting the rights of employees in that State to seek redress for injuries under its workers' compensation law. *Id.* at 408-410 & n.6.[4]

Respondents' invocation of non-LMRA cases also confuses the standard for preemption under the LMRA -- which broadly requires "doctrines of federal labor law uniformly to prevail over inconsistent local rules," *Lucas Flour*, 369 U.S. at 104 -- with tests for preemption in different contexts. BIO 17-19 (citing *Wyeth v. Levine*, 129 S. Ct. 1187 (2009) (conflict preemption); *Farmer v. United Bhd. of Carpenters and Joiners of Am., Local 25*, 430 U.S. 290, 303 (1977) (National Labor Relations Act preemption)).

Third, respondents suggest (BIO 22-23) that, because Congress has not passed *another* law in addition to the LMRA, Congress must have intended for state laws (like DATWA) to create a state-by-state patchwork of rules governing the drug testing of athletes in national professional sports leagues. That argument is completely irrelevant to the question of how existing law -- the LMRA -- operates, as well as

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[4] Respondents get no help from their citation (BIO 18) to *Lodge 76 Int'l Ass'n. of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). There, this Court held that recourse to state law to block union members' refusal to work overtime during negotiations for renewal of a collective bargaining agreement was preempted by the National Labor Relations Act's comprehensive federal policies, notwithstanding arguments about the importance of state prerogative in the area of health and safety. *Id.* at 149-151.

to the pressing need for this Court to bring uniformity to that statute's preemption principles.

The argument is also wrong. It simply ignores the praise that the NFL's strict anti-doping policy has received from Members of Congress, and Congress's full familiarity, evidenced through years of hearings, with the increasing role of collective bargaining agreements in addressing the problem of professional athletes' use of performance enhancing drugs. *See Amici Curiae* Brief of Major League Baseball, *et al.*, 6-10. The fact that Congress has not preempted respondents' claims a second time by passing yet another law thus says nothing about the need for this Court's review to bring uniformity to a federal law (the LMRA) that is itself expressly designed to ensure uniformity in the interpretation of collective bargaining agreements.

Finally, respondents assert (BIO 6) that this Court's review is not warranted because the state court litigation that has postponed enforcement of a lawful arbitration award for more than a year might (or might not) soon conclude, and thus the case might (or might not) become moot. Of course, respondents are arguing quite a different story in those state court proceedings, insisting that the case and its continuing injunction against enforcement of the arbitration award and other aspects of the collective bargaining agreement should continue at least for this football season. Resp. Minn. Ct. App. Opp. To NFL Mot. To Dismiss Appeal at 5, 10, *Williams v. NFL*, No. A10-922 (Minn. Ct. App. Sept. 15, 2010).

In any event, the contention that state court proceedings *might* be resolved in favor of the NFL is no answer to the question whether those state-court proceedings -- and, in particular, the ongoing state-law injunction against enforcement of a collectively bargained agreement and lawful arbitral award -- should exist in the first place or are, instead, preempted. Respondents have not confessed error; the litigation continues; and the injunction blocking the arbitration award upholding respondents' suspensions continues. Resp. App. 48a. The need for this Court's review likewise continues. *See Lewis v. Continental Bank Corp.* 494 U.S. 472, 477 (1990); *Elkins v. Moreno*, 435 U.S. 647, 676 (1978) (Rehnquist, J., dissenting) ("And while the case *may* become moot *if* the Court of Appeals of Maryland decides that holders of G-4 visas can establish Maryland domicile and *if* the University changes its policy in light of that decision, the case is *not* moot *now*.") (original emphasis).

Furthermore, if the Minnesota state court litigation were itself to become moot (BIO 7), it would be due to respondents' unilateral, deliberate, and voluntary decision, *after* obtaining an injunction pending appeal, not to file a notice of appeal while this certiorari petition was pending. Resp. App. 50a-61a. The appropriate response from this Court to voluntarily induced mootness that prevents this Court's review would be to grant the petition and then to vacate the Eighth Circuit's judgment of remand. "'[T]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot * * * pending [the Court's] decision on the merits is to reverse or vacate

the judgment below and remand with a direction to dismiss.'" *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 22 (1994) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). The central purpose of *Munsingwear* vacatur is to "clear[] the path for future relitigation of the issues between the parties," and to "prevent a judgment, unreviewable because of mootness, from spawning any legal consequences," *Munsingwear*, 340 U.S. at 40, 41, like the substantial inroads on LMRA preemption and the uniform enforcement of collective bargaining agreements and their arbitration awards that the Eighth Circuit's decision invites.[5]

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[5] Vacatur would be limited to the judgment of remand in *National Football League, et al. v. Williams*, (Eighth Circuit No. 09-2247, which is the only judgment of the Eighth Circuit pending before this Court. The court of appeals consolidated in a single decision its review of three separate appeals. However, no party sought review in this Court of the court of appeals' judgment rejecting the NFL Players' Association's separate appeal (*NFLPA v. NFL, et al.*, No. 09-2249), or of the judgment rejecting respondents' appeal challenging the dismissal of their state common law claims (*Williams v. NFL, et al.*, No. 09-2462).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

THE NATIONAL FOOTBALL LEAGUE,

Petitioner,

v.

KEVIN WILLIAMS AND PAT WILLIAMS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF MAJOR LEAGUE BASEBALL, MAJOR LEAGUE SOCCER, L.L.C., THE NATIONAL BASKETBALL ASSOCIATION, AND THE NATIONAL HOCKEY LEAGUE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, when the preemptive effect of Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), serves as a substantive defense to a state law claim rather than as a basis for federal removal jurisdiction, defenses that require interpretation and application of a collective bargaining agreement should be considered in determining whether Section 301 preempts the state law claim?

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INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.2, Major League Baseball ("MLB"), Major League Soccer, L.L.C. ("MLS"), the National Basketball Association ("NBA"), and the National Hockey League ("NHL") (collectively, the "Amici" or "the Leagues") respectfully submit this brief in support of the Petition for a Writ of Certiorari filed by the National Football League ("NFL").[1] The Amici are professional sports leagues with league-wide, collectively-bargained drug testing programs designed to eliminate the use of performance-enhancing drugs by their athletes. These programs are uniformly designed and administered within the respective Leagues in order, among other things, to promote public confidence in the integrity of professional sports and to ensure that no player or team will obtain an unfair advantage over his or its competitors.

The Amici have a significant interest in this case because the Eighth Circuit's decision, which denied the application of federal labor law preemption principles to Respondents' state statutory claims challenging the administration of the NFL's drug testing program, likely will adversely impact the Amici's own collectively-

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici's intention to file this brief and have consented to its filing. The letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

bargained drug testing programs and the important purposes those programs serve.

Specifically, the Eighth Circuit's ruling that Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) ("LMRA"), does not preempt Respondents' state statutory claims subjects the Amici's drug testing programs to similar challenges under these statutes by players employed by teams based in Minnesota, and potentially exposes the Amici to claims under similar state statutes by players employed by teams based in other states. Moreover, because the Eighth Circuit's ruling — that defenses based on a collective bargaining agreement may not be considered as part of the Section 301 "ordinary preemption" inquiry — widens the Circuit split on this issue, the decision further threatens the uniform enforcement of the Amici's respective drug testing programs between and among member teams.

REASONS FOR GRANTING THE PETITION

The Amici urge the Court to grant certiorari in this case because the rule of Section 301 preemption adopted by the Eighth Circuit departs from established Supreme Court precedent, deepens a split within the Circuits, and potentially subjects the league-wide drug testing programs of the NFL and the Amici — which were carefully developed through years of collective bargaining to meet the unique problems presented by the use of performance-enhancing drugs in their respective Leagues — to piecemeal modification by the 26 jurisdictions in which the Leagues have member teams.

Although the Minnesota state law claims at issue below could not be resolved without the interpretation of the NFL's collectively-bargained testing program, the Eighth Circuit held that those claims were not preempted because defenses based on a collective bargaining agreement "[we]re not relevant to our Section 301 analysis." Pet. App. 26a; *Williams v. NFL*, 582 F.3d 863, 879 (8th Cir. 2009), *reh'g and reh'g en banc denied*, 598 F.3d 932 (8th Cir. 2009), *petition for cert. filed* (May 13, 2010) (09-1380). As a result of the decision, the NFL's drug testing program could not be applied uniformly to all NFL players as the collective bargaining parties had intended. Indeed, because of the Eighth Circuit's preemption ruling, the Minnesota state court on remand was permitted to apply Minnesota state law to enjoin the enforcement of an arbitrator's decision that was issued pursuant to the collective bargaining agreement, and which simply sought to enforce the terms of the drug testing program as had been negotiated and agreed upon by the NFL and the NFL Players Association ("NFLPA").

In order to prevent unfair competitive advantages and maintain public confidence in the integrity and competitive equality of their sports, the NFL and the Amici must be permitted to operate their collectively-bargained drug testing programs without state interference, regardless of whether the relationship between state law and the program is apparent in the elements of the cause of action, or in a defense to the cause of action. When federal removal is not at issue and, therefore, the principles of "ordinary preemption" and not "complete preemption" apply, a plaintiff should not be able to avoid the preemptive effect of Section 301 by "artful" pleading. As this Court has recognized (but the Eight Circuit did not), the federal policy

requiring the uniform interpretation of collective bargaining agreements is far too important to turn on how a state cause of action is pled. *See Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399, 407-11 (1988). The need for uniformity is particularly compelling in the context of the enforcement of the Leagues' drug testing programs, which involves players in different states competing against each other in head-to-head competition.

Supreme Court review of the Eighth Circuit's decision is especially appropriate because the decision below further exacerbates the conflict between federal courts of appeals as to whether defenses based on a collective bargaining agreement should be considered in connection with the Section 301 preemption analysis outside of the context of removal. Nearly two decades ago, this Court declined to exercise its certiorari jurisdiction in a case involving the same question raised by the NFL's petition here: "whether . . . a state-law cause of action is pre-empted under § 301 of the Labor Management Relations Act by a defense based on a collective bargaining agreement." *Schacht v. Caterpillar*, 503 U.S. 926, 926 (1992). Dissenting from the denial of certiorari, Justices White and Blackmun urged the Court to hear the case and resolve the circuit court conflict as to whether defenses based on a collective bargaining agreement were to be considered when determining the preemptive effect of Section 301. *Id.* at 926-27.

Subsequent to the Court's denial of certiorari in *Schacht*, the divide among the lower federal courts has only widened, with the Seventh and Tenth Circuits

requiring consideration of defenses and the Third, Ninth, and, now, Eighth Circuits on the opposite side of the issue. *Compare Smith v. Colgate-Palmolive Co.*, 943 F.2d 764, 769-71 (7th Cir. 1991), *and Fry v. Airline Pilots Ass'n*, 88 F.3d 831, 838 n.8 (10th Cir. 1996), *with Berda v. CBS Inc.*, 881 F.2d 20, 25 (3d Cir. 1989), *Sprewell v. Golden State Warriors*, 266 F.3d 979, 991 (9th Cir. 2001), *and Williams*, 582 F.3d at 879. It is, accordingly, now clear that there is a Circuit-based, outcome-determinative conflict regarding the relevance to the ordinary preemption analysis of defenses to state law claims based on collective bargaining agreements. This conflict means that the preemptive scope of the LMRA — and the enforceability of the Leagues' drug testing programs — depends on the particular jurisdiction in which a dispute arises or in which the plaintiff chooses to file suit. This discord and its practical implications are antithetical to federal labor policy as mandated by Section 301 and the purposes of the preemption rule.

I. THE EIGHTH CIRCUIT'S DECISION, BY APPLYING AN INCORRECT PREEMPTION TEST, THREATENS THE AMICI'S ABILITY TO MAINTAIN AND ENFORCE LEAGUE-WIDE DRUG TESTING PROGRAMS THAT, THROUGH THE PROCESS OF COLLECTIVE BARGAINING, HAVE BEEN UNIQUELY DESIGNED TO ELIMINATE THE USE OF PERFORMANCE-ENHANCING DRUGS IN PROFESSIONAL SPORTS.

A. The Amici's Collectively-Bargained Drug Testing Programs Serve The Important Purpose Of Eliminating The Use Of Performance-Enhancing Drugs In Professional Sports And Require Uniform Application And Enforcement.

Congress has recognized that the use of performance-enhancing drugs by players in professional sports is an issue of considerable importance that requires league-wide solutions. Indeed, since only 2002, Congress has held hearings on this issue on *nine* separate occasions and has taken testimony from dozens of experts, including those closely involved in the League programs.[2] Having been requested to testify

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[2] *See Steroid Use in Professional Baseball and Anti-Doping Issues in Amateur Sports: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce and Tourism of the S. Comm. on Commerce, Science and Transp.*, 107th Cong. (2002); *Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. (2005); *The* (Cont'd)

about their respective Leagues' efforts to combat the use of performance-enhancing substances, the Commissioners of MLB, MLS, the NBA, and the NHL each have confirmed that the issue is of critical importance and implicates the fundamental integrity of athletic competition.[3] Likewise, the Executive Directors

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Clean Sports Act of 2005, and S. 1334, The Professional Sports Integrity and Accountability Act: Hearing Before the Subcomm. on Commerce, Science, and Transp., 109th Cong. (2005); *The Drug Free Sports Act of 2005, Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection*, 109th Cong. (2005); *Steroids in Sports: Cheating the System and Gambling Your Health: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection*, 109th Cong. (2005); *Steroid Use in Sports, Part II: Examining the National Football League's Policy on Anabolic Steroids and Related Substances: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. (2005); *Steroid Use in Sports Part III: Examining the National Basketball Association's Steroid Testing Program: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. (2005); *The Mitchell Report: The Illegal Use of Steroids in Major League Baseball: Hearing Before the H. Comm. on Oversight and Gov't. Reform*, 110th Cong. (2008); *Drugs in Sports: Compromising the Health of Athletes and Undermining the Integrity of Competition: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection*, 110th Cong. (2008).

[3] *Drugs in Sports: Compromising the Health of Athletes and Undermining the Integrity of Competition: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection*, 110th Cong. (2008) (statement of David J. Stern), *available at* http://energycommerce.house.gov/images/stories/Documents/Hearings/PDF/110-ctcp-hrg.022708.Stern-testimony.pdf; (statement of Allan H. Selig), *available at* http://energycommerce.house.gov/images/stories/Documents/
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of the Leagues' respective players associations also testified before Congress about the significance of this issue.[4]

Senator George Mitchell, in the "Report to the Commissioner of Baseball of An Independent Investigation Into the Illegal Use of Steroids and Other Performance-Enhancing Substances By Players In

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Hearings/PDF/110-ctcp-hrg.022708.Selig-testimony.pdf; (statement of Gary Bettman), *available at* http://energycommerce.house.gov/images/stories/Documents/Hearings/PDF/110-ctcp-hrg.022708.Bettman-testimony.pdf; *see also The Drug Free Sports Act of 2005, Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection*, 109th Cong. (2005) (statement of Donald P. Garber), *available at* http://archives.energycommerce.house.gov/reparchives/108/Hearings/05192005hearing1507/Garber.pdf.

[4] *Drugs in Sports: Compromising the Health of Athletes and Undermining the Integrity of Competition: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection*, 110th Cong. (2008) (statement of Donald M. Fehr), *available at* http://energycommerce.house.gov/images/stories/Documents/Hearings/PDF/110-ctcp-hrg.022708.Fehr-testimony.pdf; (statement of G. William Hunter), *available at* http://energycommerce.house.gov/images/stories/Documents/Hearings/PDF/110-ctcp-hrg.022708.Hunter-testimony.pdf; (statement of Gene Upshaw), *available at* http://energycommerce.house.gov/images/stories/Documents/Hearings/PDF/110-ctcp-hrg.022708.GoodellUpshaw-testimony.pdf; (statement of Paul Kelly), *available at* http://energycommerce.house.gov/images/stories/Documents/Hearings/PDF/110-ctcp-hrg.022708.Kelly-tesitmony.pdf.

Major League Baseball" (the "Mitchell Report"),[5] explained why programs eliminating performance-enhancing drugs in professional sports are imperative:

> First, steroids, human growth hormone and similar substances pose significant risks to those who use them. . . . Second, beyond the dangerous effects on players themselves, the public perception that players in Major League Baseball use these substances contributes to their use by young athletes, who in turn cause themselves great physical harm. . . . Third, the illegal use of anabolic steroids, human growth hormone, and similar drugs poses a significant threat to the integrity of the game of baseball . . . Finally, . . . the illegal use of these substances by some players is unfair to the majority of players who do not use them.

Senator George Mitchell, Mitchell Report, at 4, *available at* http://files.mlb.com/mitchrpt.pdf.

As then–Senator Joseph Biden summarized in 2008, "Steroids and performance-enhancing drugs not only

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[5] The Mitchell Report was the result of Senator Mitchell's 20-month investigation, commissioned by MLB, into the use of performance-enhancing substances in baseball. As Rep. Henry Waxman and Rep. Tom Davis stated, the Mitchell Report is "an important step towards the goal of eliminating the use of performance-enhancing substances." "Waxman and Davis Joint Statement on Mitchell Report," *available at* http://oversight.house.gov/images/stories/documents/20071213160659.pdf.

pose great health risks, but they threaten the fundamental integrity of sports." Press Release, Joseph R. Biden, Jr., Senate's Approval of the International Convention Against Doping in Sport (July 22, 2008), *available at* http://www.votesmart.org/speech_detail.php?sc_id=393274&keyword=&phrase=&contain=.

Because of the importance of the issue of the use of performance-enhancing substances in professional sports, the Amici and their respective player associations, with the encouragement of Congress,[6] have each bargained over and adopted through the collective bargaining process league-wide drug testing programs. These comprehensive programs include extensive lists of banned substances, comprehensive testing mechanisms, stringent procedures (including safeguards and appeal rights), and robust enforcement mechanisms intended to reduce the use of performance-enhancing substances. Each of the programs is an intricate system of regulation designed to take into account and address each League's unique circumstances and needs. The parties to the respective collective bargaining relationships and their experts in the field of performance-enhancing substances have developed the details of these programs through multiple rounds of collective bargaining that have taken place over many years.[7]

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[6] *See, e.g, The Drug Free Sports Act of 2005, Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection*, 109th Cong. 4, 8, 11 (2005).

[7] *See* "Performance Enhancing Substances Program of the NHL," *available at* http://www.nhl.com/cba/2005-CBA.pdf; (Cont'd)

A critical element of each League's drug testing program is the uniform application and enforcement of that program across each League. Each League's program applies to every player within the League regardless of the player's team or its location, and regardless of the player's residence. This uniform application is essential to the Leagues' operations. Without it, sports leagues would be unable to maintain any semblance of competitive balance or integrity. But the Eighth Circuit's ruling opens the door for an imbalance, whereby players in one state can use performance-enhancing substances while players in other states cannot.

In this way, professional sports leagues, by their very nature, are fundamentally different from other industries (even when compared to other multi-state business organizations). Professional sports leagues require athletic competition between their member teams, yet also require a uniform set of standards and rules to ensure that no single player or team has an unfair advantage. In no other industry do the employees of different employers in different states physically

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"Major League Baseball's Joint Drug Prevention and Treatment Program," *available at* http://mlbplayers.mlb.com/pa/pdf/jda.pdf; "NBA and NBPA Anti-Drug Program," *available at* http://www.nbpa.org/sites/default/files/ARTICLE%20XXXIII.pdf; *see also The Drug Free Sports Act of 2005, Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection*, 109th Cong. (statement of Donald P. Garber), *available at* http://archives.energycommerce.house.gov/reparchives/108/Hearings/05192005hearing1507/Garber.pdf.

compete against each other and this circumstance requires that such employees be governed by rules that apply across the board to all participants. Indeed, the collective bargaining relationships between the Leagues and their respective players associations have carefully evolved over the decades to reflect the unique requirements of the professional sports industry and its "numerous problems with little or no precedent in standard industrial relations." *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954, 961 (2d Cir. 1987). The existing collectively-bargained drug programs in the Leagues, with their emphasis on uniform enforcement and application of often complicated rules and procedures, are the intricately constructed product of this evolution.

B. The Eighth Circuit's Ruling, By Departing From Supreme Court Precedent, Fosters State Law Interference With The Leagues' Collectively-Bargained Drug Testing Programs And Deepens The Conflict Between Circuit Courts.

This Court has emphasized that Section 301 preemption is necessary to ensure the "uniform interpretation of collective bargaining agreements" and to "promote the peaceable consistent resolution of labor-management disputes." *Lingle*, 486 U.S. at 404. Accordingly, "if the *resolution* of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law . . . is pre-empted *and* federal labor law principles . . . must be employed to resolve the dispute." *Id.* at 405-06 (emphasis added) (citations omitted); *see also Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985) ("[W]hen resolution of a

state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim, or dismissed as pre-empted by federal labor-contract law.") (internal citations omitted). Moreover, Section 301 preemption also prevents states from intruding into "[t]he ordering and adjusting of competing interests through a process of free and voluntary collective bargaining" which "is the keystone of the federal scheme to promote industrial peace." *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962).

If the Eighth Circuit had followed the logic and rationale of *Lingle* and other Supreme Court preemption precedent, the Minnesota state law claims would have been held preempted because the claims against the NFL cannot be resolved without interpreting the collective bargaining agreement.

Under the Minnesota Lawful Consumable Products Act ("LCPA"), Minn. Stat. § 181.938, employers generally are forbidden from prohibiting employees from using "lawful consumable products." *Id.* § 181.938(2). This provision of the statute is in conflict with the Leagues' drug testing programs because many of the performance-enhancing substances prohibited by the Amici's anti-drug programs are legal with a prescription and some are available without a prescription at stores such as GNC. *See, e.g.*, "Major League Baseball's Joint Drug Prevention and Treatment Program," *available at* http://mlbplayers.mlb.com/pa/pdf/jda.pdf. If the preemptive scope of Section 301 does not extend to

claims raised under the LCPA, then players on the Minnesota Twins (MLB), Wild (NHL), Timberwolves (NBA), or Vikings (NFL) could be permitted to use these "lawful" substances notwithstanding the prohibitions in their Leagues' respective programs — thereby providing them with an unfair competitive advantage over players on teams in other states, as to whom the applicable League drug testing program would apply in full measure.

Although the LCPA has an exception if the restriction "relates to a bona fide occupational requirement and is reasonably related to employment activities or responsibilities of a particular employee or group of employees," Minn. Stat. § 181.938(3)(a)(1), the application of this exception is clearly dependent upon the interpretation and application of the Leagues' collective bargaining agreements. Under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, it is the Leagues' collective bargaining agreements — including their drug testing provisions — that set forth the terms and conditions of players' employment and therefore define the players' employment activities. *See NLRB v. Katz*, 369 U.S. 736 (1962). Accordingly, this provision of the LCPA *requires* the state court to interpret the Leagues' collective bargaining agreements to determine whether, if a substance prohibited by such agreements is a "lawful consumable product," the restriction imposed on the use of that "lawful consumable product" is a bona fide occupational requirement that is "reasonably related" to the "employment activities" of the employee. Indeed, there is no way to resolve the threshold question under the LCPA without interpreting and applying these collective bargaining agreements.

The Minnesota Drug and Alcohol Testing in the Workplace Act ("DATWA"), Minn. Stat. § 181.950 *et seq.*, also provides employees with certain protections that may not comport with the Amici's respective drug testing programs. For example, the DATWA restricts random drug testing. *Id.* § 181.951(4). While the DATWA purports to exempt "professional athletes" from that restriction, the statute's safe harbor provision applies only if that random testing is "consistent with the collective bargaining agreement." *Id.* Thus, in cases involving random testing, the DATWA itself actually requires the state court to interpret the parties' collective bargaining agreement at the threshold and to determine whether the employer acted consistently with the collective bargaining agreement's procedures and requirements. Accordingly, a suit under the DATWA effectively becomes "a suit in state court alleging a violation of a provision in a labor contract" and, therefore, "must be brought under § 301 and be resolved by reference to federal law." *Allis-Chalmers Corp.*, 471 U.S. at 210.

Further compounding the problem is that professional sports leagues also are unable to adhere to the confidentiality provisions of the DATWA, Minn. Stat. § 181.954, as the Leagues' drug testing programs — at the encouragement of Congress — make positive drug tests and players' suspensions public, both as a penalty and a deterrent.

In addition, the DATWA states that an employee can only bring a claim under the statute after first

exhausting all grievance procedures mandated by the applicable collective bargaining agreement. This provision makes interpretation and application of the parties' grievance procedure an element in the resolution of every DATWA claim. Here, Respondents' claims were adjudicated through the grievance procedure established under the labor contract precisely as the bargaining parties had intended. Instead of enforcing that result, the Minnesota state court, following remand, continually enjoined the enforcement of that arbitration award upholding the suspension of Respondents under the terms of the collective bargaining agreement, first, pending the trial of their state law claims and, more recently, during the pendency of their appeals.[8]

Indeed, [illegible] NFL (or [illegible] the meaning of the DATWA is inherently intertwined with the interpretation and application of the parties' collective bargaining agreements, as the state court proceedings on remand unequivocally demonstrate. *See, e.g.*, *Williams v. NFL*, No. 27-CV-08-29778, at 17 (Minn. 4th [illegible] The NFL directly and indirect[illegible] aspects of a player's life both on and off the field. This control emanates from a series of formal rules and regulations existing both separate from and *in conjunction with* the [collective bargaining agreement].") (emphasis added); *see also id.*

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[8] *See* W[illegible] 4th Dist. Ct., Mag[illegible]

at 3-4, 6, 15, 17-19, 21-22 (concluding that the NFL was a joint employer of Respondents for purposes of the DATWA based on, *inter alia*, interpretation of the NFL/NFLPA collective bargaining agreement).

Because the Eighth Circuit did not preempt state law claims brought pursuant to the DATWA, the Leagues will be forced either to treat players in Minnesota differently, to the disadvantage of players on teams in other states, or effectively abandon the enforcement of their collectively-bargained drug programs in order to avoid allowing such disadvantages. This is not a hypothetical consequence; in order to avoid unfairly advantaging the Vikings because of the application of state law in this case, the NFL found it necessary to delay the enforcement of its suspensions of three New Orleans Saints players who were subject to suspensions under Minnesota state law or a comparable Louisiana law. As a result of the Eighth Circuit's decision and the application of Minnesota state law, the NFL's collectively-bargained drug program has not functioned as the parties to the collective bargaining relationship intended.

Although — as the post-remand state court proceedings only confirm, *Williams*, No. 27-CV-08-29778, at 3-4, 6, 15, 17-19, 21-22 — interpretation of the collective bargaining agreement was required for resolution of Respondents' claims, the Eighth Circuit did not follow *Wagner* and its progeny in adopting a bright-line rule that the NFL's defenses based on a collective bargaining agreement may not be considered in making

the preemption determination under Section 301. Pet. App. 26a; *Williams*, 582 F.3d at 879.

The Eighth Circuit conflated the complete preemption doctrine with ordinary preemption and therefore premised its decision on a legal principle — the well-pleaded complaint rule — that is wholly inapplicable to the ordinary preemption analysis. *Id.* The doctrine of complete preemption and its corollary, the well-pleaded complaint rule, apply when the question is whether a complaint that raises only state law claims may be removed to federal court. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392-93 (1987). Under the complete preemption doctrine, if a complaint asserting only state law claims is well-pled, the case may not be removed based on the defense that interpretation of a collective bargaining agreement is required to resolve the claim. *Id.* Thus, complete preemption is a *jurisdictional doctrine* related to the removability of a case initially filed in state court. *Id.* In contrast, ordinary preemption is a *substantive defense* aimed at the merits of the asserted state claim and may be invoked in either federal or state court. *Id.* Ordinary preemption simply declares the primacy of federal law, regardless of the forum or the claim. *Id.* at 392.

The Eighth Circuit failed to recognize that complete preemption and ordinary preemption are distinct legal concepts that serve completely different functions.[9]

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[9] Although the Eighth Circuit declined rehearing en banc, four judges dissented and observed that the panel's decision was premised on a fundamental misunderstanding of "[t]he procedural distinction between cases involving complete preemption and ordinary preemption. . . ." Pet. App. 75a; *Williams v. NFL*, 598 F.3d 932, 936 (8th Cir. 2009).

As a result of this misapplication of complete preemption when removal was not at issue, the Eighth Circuit improperly confined its analysis to the allegations of Respondents' complaint and categorically ignored the numerous and significant relationships between the resolution of the state law claims and the NFL's collectively-bargained drug program discussed above, which were asserted as defenses by the NFL.

The Eighth Circuit has now joined the Ninth Circuit and Third Circuit in holding that an employer's defenses relying on a collective bargaining agreement are irrelevant even when the evaluation of those defenses is critical to resolving the plaintiff's purported state law claims and is unrelated to removal. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 991 (9th Cir. 2001); *Berda v. CBS Inc.*, 881 F.2d 20, 25 (3d Cir. 1989). In contrast, the Seventh and Tenth Circuits have recognized that defenses based on a collective bargaining agreement, while irrelevant to the jurisdictional question of whether a claim filed in state court may be removed to federal court (*i.e.*, "complete preemption"), must be considered when addressing the *substantive* defense of ordinary preemption. *See Fry v. Airline Pilots Ass'n*, 88 F.3d 831, 838 n.8 (10th Cir. 1996); *Smith v. Colgate-Palmolive Co.*, 943 F.2d 764, 769-71 (7th Cir. 1991).

The Eight Circuit's decision widens an already intolerable split among the Circuits. The rules of ordinary preemption under Section 301 continue to vary from Circuit to Circuit, and now even more so. As a result, the uniformity and predictability contemplated by the LMRA — and which is especially significant to the Amici here — cannot be maintained. The practical

implications for the Amici's drug testing programs are obvious and profound. State law regulation of the Amici's drug testing programs may be permissible in Minnesota against players on the Timberwolves, Wild, and the Twins but not in Colorado against players on the Nuggets, Avalanche, and the Rockies — as the Tenth Circuit holds that a state claim is preempted if the collective bargaining agreement must be interpreted and applied to resolve a defense to such a claim, but the Eighth Circuit holds that the employer's defenses based upon a collective bargaining agreement are irrelevant in that context. This disparity will ultimately plague sports leagues with inequity and disrupt the cornerstone of professional sports — competitive balance.

This Court's intervention is necessary to resolve the Circuit split and restore the uniformity and predictability that is essential to federal labor policy and the uniform administration of the Leagues' drug programs.

CONCLUSION

Based on the foregoing, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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